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IN THE

Supreme Court of the United States

ROBERT L. JORDAN,
Petitioner,

v.

ALTERNATIVE RESOURCES CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Title VII of the 1964 Civil Rights Act is violated when the cumulative effect of a series of racially (or sexually) harassing acts creates a hostile work environment. The first Question Presented is as follows:

> Where an employee promptly complains about an incident of harassment as contemplated by the Court's decisions in cases such as *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), can the employer lawfully retaliate for that complaint, unless there have been so many other incidents of harassment that the employee could reasonably conclude that an unlawful hostile work environment has already been created?

2. Where a complaint alleges that the defendant acted for an unlawful discriminatory purpose, does Rule 12(b)(6) require that the complaint *also* allege specific underlying facts which would support a finding of discriminatory intent?

PARTIES

The petitioner is Robert L. Jordan. The respondents are Alternative Resources Corporation and International Business Machines Corporation.

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No. 06-___

ROBERT L. JORDAN,

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ALTERNATIVE RESOURCES CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Jordan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 14, 2006.

OPINIONS BELOW

The order of the Court of Appeals granting panel rehearing, and the panel decision on rehearing, which is reported at 458 F.3d 332 (4th Cir. 2006), appear at App. A, 1a-45a. The court's orders denying rehearing *en banc* appear at App. B, 46a-48a, and opinions concerning that denial are reported at 467 F.3d 378 (4th Cir. 2006) and appear at App. B, 49a-57a. The decision of the District Court is reported at 2005 WL 736610 (D. Md. 2005) and appears at App. C, 58a-78a; the district court's orders of March 30, 2005 and April 26, 2005 appear at App. C, 79a-82a.

JURISDICTION

The Court of Appeals entered judgment on August 14, 2006. The court denied rehearing *en banc* on October 2, 2006. On December 12, 2006, the Chief Justice extended the time for filing this petition until February 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the application of the anti-retaliation provision in Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which provides in pertinent part:

> (a) *Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.* It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT

In October 2002, petitioner Jordan, an African-American employee of respondents Alternative Resources Corporation (ARC) and International Business Machines Corporation (IBM) (who were joint employers of Jordan), was standing near his IBM co-worker, Jay Farjah, in a television room at their IBM worksite in Maryland. They were watching reports on the capture of two snipers (both African-American) who had terrorized the Washington, D.C. area that fall. As they watched, Farjah loudly declared that "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them." Immediately after Farjah made the "black monkeys" comment, Jordan reported it to other co-

workers, and two of them told him that "they had heard Farjah make similar offensive comments many times before." (Amended Complaint, ¶ 10; *see* Court of Appeals Joint Appendix, p. 81.)

Armed with this knowledge and consistent with IBM's policy that its employees were obligated to report offensive or racially discriminatory conduct to management, Jordan reported the "black monkeys" comment to several IBM and ARC supervisors.

Jordan's working conditions deteriorated sharply soon after he reported that racist remark. Jordan's work schedule was changed, without notice or explanation, in a manner calculated to cause him considerable difficulty, and his workload was suddenly increased. At the office Thanksgiving party, one of Jordan's supervisors directed a crude, derogatory remark and gesture at him. On November 21, 2002, about a month after his first complaint, Jordan was fired from his job at IBM's request.

Jordan commenced this action, alleging *inter alia* that he had been dismissed for complaining about Farjah's racist remark, in violation of section 704(a) of Title VII, and also (in an amended complaint) because of his race, in violation of 42 U.S.C. § 1981.[1] Respondents ARC and IBM moved to dismiss under Rule 12(b)(6), asserting that Jordan's complaint failed to state a claim on which relief could be granted.

The District Court granted the motion to dismiss. It held that Jordan's action in complaining about the racist remark was not protected from retaliation by section 704(a), and that it was therefore legal under Title VII for ARC and IBM to fire Jordan because he had objected to that remark. (Appendix (App.) at 64a-66a.) The District Court concluded that the allegation that Jordan had been dismissed because of his race

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[1] The complaint was originally filed in Maryland state court; respondents removed the action to Federal court.

was legally insufficient because the complaint "alleged no facts suggesting that his own race played any role in his termination." (*Id.* at 70a.)

The Fourth Circuit panel which heard the appeal that followed affirmed over the dissent of Judge King. The panel initially issued its opinion on May 12, 2006. Following a petition for rehearing, the panel withdrew that initial opinion, and on August 14, 2006 issued a second opinion again affirming the decision of the district court over Judge King's dissent. The majority of the panel held that section 704(a) of Title VII does not protect an employee from retaliation if he or she reports a single act of racial or sexual harassment; the majority insisted that an employee can lawfully be fired for complaining about harassment until the point where the cumulative effect of the harassment is either to create an unlawful hostile work environment or to come so close to doing so that an employee could reasonably conclude that Title VII had been violated. (App. 10a-12a.) The panel also upheld the dismissal of Jordan's section 1981 claim, agreeing with the district court that the complaint was defective because it did not set forth facts which sufficiently supported an inference that Jordan had been fired because of his race. (*Id.* at 23a.)

Judge King in a dissenting opinion objected that the majority opinion conflicted with several decisions of this Court. Judge King pointed out that the majority opinion—by permitting an employer to fire a worker for complaining about racial or sexual harassment, so long as the harassment had not yet reached (or almost reached) the point of creating an unlawful hostile environment—had created a rule inconsistent with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Judge King noted in particular that *Ellerth* expressly sought to encourage workers to complain about harassment "before" that harassment had created a hostile

work environment, and that Fourth Circuit case law required workers to do so in order to avoid forfeiting their harassment claims. The panel decision, Judge King argued, construed section 704(a) to permit employers to fire workers (like Jordan) for having made the very complaints which the Fourth Circuit itself held were required by *Ellerth* and *Faragher*. (App. 37a-38a.) In addition, Judge King objected that the majority's requirement that Jordan plead more detailed facts to support his allegation that he had been fired because of his race raised a "direct conflict" with this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). (*Id.* at 42a.)

Jordan filed a timely petition for rehearing *en banc*. The EEOC filed an amicus brief in support of rehearing, arguing—as did Jordan—that the decision of the panel majority conflicted with *Ellerth* and *Faragher*. The petition for rehearing was denied on a tie 5-5 vote. Five members of the Fourth Circuit joined in an opinion dissenting from the denial of rehearing *en banc*. Those five members of the court argued that the panel decision rejecting Jordan's section 704(a) retaliation claim was inconsistent with this Court's decision in *Ellerth* and *Faragher*, and conflicted as well with the Court's June 2006 opinion in *Burlington Northern & Santa Fe Railway Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405 (2006). The five dissenting judges also objected that the panel decision requiring that Jordan plead more (or better) facts in support of his discrimination claim conflicted with this Court's decision in *Swierkiewicz*. Those five members of the Fourth Circuit concluded that, "Although Jordan's petition [for rehearing *en banc*] has been denied, his contentions in this appeal have substantial merit, and they warrant serious consideration by the Supreme Court." (App. 54a.)

REASONS FOR GRANTING THE PETITION

This case presents two questions of exceptional importance. The first concerns the extent to which the anti-retaliation provision of Title VII protects workers from dismissal because they object to racially (or sexually) abusive remarks. The second issue presents a recurring dispute about the degree to which a plaintiff must plead specific facts to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In response to a petition for rehearing *en banc*, the Fourth Circuit was divided equally. Five members of the Court of Appeals, in a pointed and compelling dissent, argued that the original panel decision in this case conflicts with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, *Faragher v. City of Boca Raton*, *Burlington Northern & Santa Fe Railway Co. v. White*, and *Swierkiewicz v. Sorema N.A.* Five other members of the Fourth Circuit, however, voted to deny rehearing; the petition for rehearing was thus rejected on a tie vote. The five circuit judges who favored rehearing *en banc* took the extraordinary step of joining an opinion that expressly "urge[s] the Supreme Court to accord serious consideration to any petition for certiorari that Jordan may file." (App. 57a.) As we explain below, the dissenters were correct in their conclusion that the panel decision in this case indeed conflicts with the decisions of this Court.

I. THE DECISION OF THE FOURTH CIRCUIT ON RETALIATION CONFLICTS WITH THE DECISIONS OF THIS COURT IN *BURLINGTON INDUSTRIES, INC. V. ELLERTH*, *FARAGHER V. CITY OF BOCA RATON*, AND *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE*

A. The Decision of the Fourth Circuit Conflicts with the Decisions of this Court in *Ellerth* and *Faragher*

Five members of the court of appeals below properly concluded that "the panel majority's denial of Jordan's Title VII claim is contrary to Supreme Court precedent established by *Burlington Industries, Inc. v. Ellerth* . . . [and] *Faragher v. City of Boca Raton*." (App. 54a.) The conflict involves more than a simple doctrinal inconsistency between the holding below and this Court's decisions in *Ellerth* and *Faragher*. Far more seriously, under the law now established in the Fourth Circuit "when an employee complies with *Ellerth* and *Faragher* in promptly reporting racial charged conduct, he is stripped of his protection from retaliation under [section 704(a) of] Title VII." (App. 54a-55a.) Thus, under the decision below, as the EEOC has repeatedly objected,[2] millions of workers in the Fourth Circuit face an intolerable conundrum. Under the Fourth Circuit's crabbed interpretation of section 704(a), workers as a practical matter can only avoid lawful retaliatory dismissal by delaying complaints about harassment so long that they forfeit—under *Ellerth* and *Faragher*—their right to seek judicial redress for racial or sexual harassment.

An interpretation of section 704(a) that produces this conundrum—and that consequently deters workers from complaining about racial or sexual harassment—ill serves the

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[2] See pp. 12-13, *infra*.

interest of most employers. As several major employer organizations have observed in this Court,

> [m]any instances may arise where employers, particularly large ones such as members of [the Equal Employment Advisory Council] and the Chamber [of Commerce of the United States], are unaware of potentially discriminatory conduct occurring in the workplace. In these situations, they must rely on their employees to report any potential discrimination. Even if the conduct does not rise to the level of actionable discrimination, it still may disrupt the workplace and require attention. *The sooner the employer learns of the potential discrimination, the sooner it can address it.*[3]

This conflict derives from the nature of the Title VII prohibition against racial and sexual harassment. Discriminatory harassment is unlawful only when it is so severe or pervasive that it results in a hostile work environment. Ordinarily a single act of harassment will not by itself create such an environment:

> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. . . . The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, *a single act of harassment may not be actionable on its own.* . . . Such claims are based on the cumulative effect of individual acts.

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) (emphasis added).

The question presented is one of great importance to every victim of, or witness to, racial or sexual harassment—does

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[3] Brief *Amicus Curiae* of the Equal Employment Advisory Council and the Chamber of Commerce of the United States in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), 2001 WL 995295 at *21 (emphasis added).

section 704(a) of Title VII protect an employee who complains about the first (or the early instances) of racial or sexual abuse? The Fourth Circuit below held that employees are not protected from retaliation—including (as in this case) retaliatory dismissal—if they complain to their employers at once about such abuse. Under the interpretation adopted by the Court of Appeals, the anti-retaliation protections of section 704(a) simply do not apply until the victim has endured so much racial or sexual harassment that the cumulative effect of that harassment is to create a hostile environment that violates Title VII, or is so close to a Title VII violation that the worker (assumed to be aware of the intricate case law defining a hostile work environment) could reasonably (albeit perhaps mistakenly) conclude that a violation "was actually occurring" or "had occurred." (App. 11a, 52a.) Under this standard, section 704(a) does not protect a minority employee who complains about the first racial slur, or the female employee who objects to the first unwanted touching of her body or the first time her boss sends her graphic pornography.

The dissenters below correctly recognized that this narrow construction of section 704(a) is, as a practical matter, inconsistent with this Court's decisions in *Ellerth* and *Faragher*. The central purpose of *Ellerth* and *Faragher* was to encourage harassment victims to promptly alert their employers to any discriminatory behavior. Those decisions fashioned an affirmative defense to racial and sexual harassment claims. Employers in some circumstances can assert that defense if they can prove that they acted reasonably to prevent or correct any harassment (generally through the creation and enforcement of anti-harassment policies) and that the employee unreasonably failed to ameliorate harm by using the company's preventive or remedial mechanisms. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

The Court in *Ellerth* explained that

> Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context . . . . To the extent limiting employer liability could encourage employees to report harassing conduct *before it becomes severe or pervasive*, it would also serve Title VII's deterrent purpose.

524 U.S. at 764 (emphasis added).

The Court's express intent to "encourage employees to report harassing conduct *before* it becomes severe or pervasive" goes to the heart of the Title VII remedial scheme. The "primary objective" of Title VII is the prevention of discrimination and harm, *Faragher*, 524 U.S. at 806; the very reason the Court in *Faragher* and *Ellerth* created an affirmative defense in hostile environment cases was to give both employers and employees an incentive to take actions that stop hostile environments from arising:

> The [affirmative] defense comprises two necessary elements: (a) that the employer exercised reasonable care to *prevent* and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any *preventive* or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807 (emphasis added).

The Fourth Circuit has repeatedly held that under *Ellerth* and *Faragher* a victim of harassment must—on pain of forfeiting his or her hostile environment claims—complain promptly after any harassment occurs. *E.g., Matvia v. Bald Head Island Management, Inc.*, 259 F. 3d 261, 270 (4th Cir.

2001). A harassment victim cannot "investigate, gather evidence, and [only] then approach company officials," *id.* at 269, but must report any harassment straightaway. Other circuits as well insist that under *Ellerth* and *Faragher* an employee may forfeit his or her right to judicial relief if the employee fails to complain "when the harassment initially began," *Walton v. Johnson & Johnson Services, Inc.*, 347 F. 3d 1272, 1290 (11th Cir. 2003), so that the employer could "prevent [the] harassment from becoming 'severe or pervasive,'" *Greene v. Dalton*, 164 F. 3d 671, 675 (D.C. Cir. 1999).

Judge King, in his opinion dissenting from the original panel decision, accurately described the impossible dilemma created by the majority:

> As a result of today's decision, employees in this Circuit who experience racially harassing conduct are faced with a "Catch-22." They may report such conduct to their employer at their peril (as Jordan did), or they may remain quiet and work in a racially hostile and degrading work environment, with no legal recourse beyond resignation. Of course, the essential purpose of Title VII is to avoid such situations. . . . .
>
> If Jordan . . . could have foreseen [the panel decision], he would have recognized that—aside from immediately filing an EEOC complaint—he had but two choices. He could remain silent, in direct defiance of this Court's commandment [under *Ellerth* and *Faragher*] to report racially charged conduct as soon as it occurs (thereby allowing Farjah's pattern of conduct to continue unchallenged, and forfeiting any judicial remedy he might have); or he could risk his career in an effort to attack the racist cancer in his workplace. . . . .[I]f Title VII protects all employees who comply with the *Ellerth/Faragher* defense's reporting duty, the majority's decision is wrong.

(App. 38a-40a.)

The five circuit judges who dissented from the denial of rehearing *en banc* properly characterized the majority's strained interpretation of section 704(a) as compelling employees to give up either the substantive protections of section 703(a) or the protection from retaliation which is the purpose of section 704(a).

> In forcing employees to choose between hostile work environment claims and the protection authorized under Title VII's anti-retaliation provision, the majority has effectively nullified Congress's policy judgment that those safeguards against workplace discrimination should operate concurrently.

(App. 57a.)

The EEOC filed three amicus briefs in the Fourth Circuit in this case, repeatedly objecting that the panel decision "is not compelled by the language of Title VII and . . . conflicts with *Ellerth*."[4] Indeed,

> [t]he central problem with the majority decision is that it is incompatible with *Faragher* and *Ellerth*. The Supreme Court in *Faragher* and *Ellerth* adopted an affirmative defense for employers designed to encourage . . . employees to take actions designed to prevent hostile environments from developing. . . . In neither decision did the Court encourage or caution employees to wait until they reasonably believe a hostile environment has already occurred, or is about to occur, before using the employer's complaint procedures.[5]

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[4] *Amicus* Brief of the Equal Employment Opportunity Commission at 6, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (July 14, 2005).

[5] *Amicus* Brief of the Equal Employment Opportunity Commission in Support of Request for Rehearing *En Banc* at 9-10, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (Sept. 25, 2006).

The Fourth Circuit's decision, the EEOC observed, puts harassment victims in a quandary.[6] In particular, "without relieving employees of the duty imposed on them by *Faragher* [and] *Ellerth* . . . to report harassment promptly, the majority has stripped them of the corollary protection against retaliation."[7]

The EEOC also emphasized the likelihood that the Fourth Circuit's decision will discourage third parties from reporting harassment they have encountered, because often they simply will not know whether additional acts of harassment, sufficient to create a legally recognized hostile work environment, have occurred: "An employee who has witnessed some significant harassment will often not know whether he has witnessed all the harassment that occurred, and will therefore often be in a poor position to assess whether a hostile environment is present (or imminent) yet or not."[8] This was in some respects Robert Jordan's situation.

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[6] *Amicus* Brief of the Equal Employment Opportunity Commission at 17, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (July 14, 2005) ("This ruling puts employees like Jordan in a catch-22 situation. On the one hand, if they complain too early—*i.e.*, before the harassment is so bad that a court would later rule that a reasonable person could have deemed it unlawful—their employers will be free to retaliate against them at will. On the other hand, if they wait until the harassment is so bad that it is clearly unlawful, they will be precluded from securing relief for the hostile environment because their employers will be found to have not been on notice of the harassment until the employees finally complained about it. This rule frustrates Title VII's purpose of eliminating discrimination in the workplace.").

[7] *Amicus* Brief of the Equal Employment Opportunity Commission in Support of Request for Rehearing *En Banc* at 12, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (Sept. 25, 2006).

[8] *Amicus* Brief of the Equal Employment Opportunity Commission in Support of Request for Rehearing at 8, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (June 6, 2006).

The attempt of the panel majority below to explain away the conflict with *Faragher* and *Ellerth* is entirely unpersuasive. The panel asserted:

> [T]he employee can belatedly report discriminatory conduct and still be protected from retaliation. . . . [A]n employee who unreasonably delays acting on his discrimination claim and thereby loses his right to a judicial remedy still has the incentive to report the unlawful conduct, under the protection of the antiretaliation statute, because of the increased likelihood that his employer will remedy the conduct extrajudicially in order to maintain the effectiveness of its antidiscrimination policy.

(App. 15a.)

This is simply an acknowledgment that under the Fourth Circuit rule the only way an employee can protect his or her rights under section 704(a) is by forfeiting (under *Faragher* and *Ellerth*) any right to judicial relief for the unlawful harassment. The panel offers only the consoling thought that the employer—although under no obligation to end the illegal harassment—might still decide to do something about it. A central purpose of *Faragher* and *Ellerth*, however, was to encourage employees to complain promptly to their employers about harassment, by guaranteeing workers that such reports would assure the availability of judicial remedies. The decision below stands *Faragher* and *Ellerth* on their heads, converting those decisions into grants of immunity from liability for any employer whose workers are unwilling to risk their jobs to file the prompt complaints that the Court sought to encourage.

The panel majority suggested that an employee might be protected from retaliation if he or she complained about a *plan*, not yet fully executed, to create a hostile work environment; as Judge King noted in his dissent, however, the

suggestion that bigots ordinarily (if ever) announce such plans in advance is simply "fanciful."[9]

As five members of the Fourth Circuit correctly recognized, the decision below turns section 704(a) into a license permitting employers to retaliate against workers for engaging in the prompt reporting of harassment which *Faragher* and *Ellerth* sought to encourage, and which the Fourth Circuit itself insists is mandatory under those decisions.

B. The Decision of the Fourth Circuit Conflicts with the Decision of this Court in *Burlington Northern & Santa Fe Railway Co. v. White*

Five members of the Fourth Circuit also concluded that the decision below was inconsistent with this Court's decision in *Burlington Northern & Santa Fe Railway v. White*, 126 S. Ct. 2405 (2006):

> In its recent *White* decision, the Court instructed that we must construe Title VII's anti-retaliation provision broadly, so as to further 'the . . . provision's primary purpose' of 'maintaining unfettered access to statutory remedial mechanisms." *White*, 126 S. Ct. at 2414 (2006). Nevertheless, the panel majority, without addressing *White's* holding, has construed Title VII's anti-retaliation provision so narrowly that most employees who seek its protection will have their access to statutory remedial mechanisms either fettered or barred altogether.

(App. 55a.)[10]

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[9] "[R]equiring an employee to show that a hostile work environment was being planned imagines a fanciful world where bigots announce their intentions to repeatedly belittle racial minorities at the outset, and it ignores the possibility that a hostile work environment could evolve without some specific intention to alter the working conditions of African-Americans through racial harassment." (App. 35a.)

[10] A recent district court decision refused to follow the Fourth Circuit decision in the instant case on the ground that it is inconsistent with

The decision in *White* reiterated this Court's longstanding view that "[i]nterpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *White*, 126 S. Ct. at 2414; *see Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). Assuring workers that they can resort to employer-created anti-harassment policies is no less important than assuring access to the EEOC. *White* held that section 704(a) forbids employers from taking any retaliatory action that would be "likely to dissuade employees from complaining or assisting in complaints about discrimination." 126 S. Ct. at 2416.

That principle is equally applicable to the interpretation of section 704(a) itself; the statutory anti-retaliation provision emphatically cannot be interpreted in a manner which would be "likely to dissuade employees from complaining." Yet the Fourth Circuit decision in the instant case does precisely that. At best an employee is required to predict—at peril of losing his or her job—whether enough acts of harassment have occurred that a court would someday think it reasonable to believe that a hostile environment had been created. As the EEOC pointedly observed, "[t]he majority rule . . . requires lay harassment victims to make demandingly intricate judgments" about when the number and seriousness of harassing

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White. In a case much like this one, *Greene v. MPW Industrial Services, Inc.*, 2006 WL 3308577 (E.D. Pa. 2006), the plaintiff was fired after complaining about a co-worker's racist remark. The employer, citing the decision below, argued that the plaintiff's complaint was not protected. The court disagreed, saying that "the majority's analysis [in *Jordan*] unfairly requires an employee to sit back and wait until harassment has become severe and pervasive before bringing it to the employer's attention." *Id.* at *3. The court found this holding "at odds with the Supreme Court's recent pronouncement [in *White*, 126 S. Ct. at 2414] that 'Title VII depends for its enforcement upon the cooperation of employees,' and that 'effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'" *Id.*

incidents have reached the level at which it is safe to complain.[11] In the instant case the members of the Fourth Circuit panel were divided as to whether a reasonable employee could have believed that a Title VII violation was occurring or likely. *Compare* App. 10a-12a *with* App. 33a-35a. Judges frequently disagree as to whether a given set of circumstances created a hostile work environment. Save in extreme circumstances in which virtually any judge would agree a hostile work environment exists, the very real danger that a complaint might be deemed to fall outside the protections of section 704(a) would dissuade a reasonable worker from making or supporting a complaint of harassment. This is not what *White* contemplated.

C. The Court's Decision in *Clark County School District v. Breeden* Does Not Require Abandoning the Principles of *Ellerth* and *Faragher*

The panel majority relied in part on this Court's *per curiam* decision in *Clark County School District v. Breeden*, 532 U.S. 268 (2001). In the litigation in the courts below, respondents argued that *Breeden* had effectively overruled any aspect of *Faragher* and *Ellerth* which sought to encourage or require workers to complain about harassment before enough incidents had occurred to create an actionable hostile work environment. It is doubtful that the Court intended to work so substantial a change in the law with a *per curiam* opinion, but if so, *Breeden* should be reconsidered.

In *Breeden* the plaintiff had complained about an isolated occasion when several colleagues laughed at a fairly opaque sexual comment reported in a personnel file. Assuming without deciding that an employee could invoke Title VII's

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[11] *Amicus* Brief of the Equal Employment Opportunity Commission in Support of Request for Rehearing *En Banc* at 13, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (Sept. 25, 2006).

anti-retaliation protection if she complained about practices that she reasonably believed were unlawful—the standard that had been used by the court of appeals in *Breeden*—this Court held that the facts of *Breeden* did not meet that standard. "No reasonable person could have believed that the single incident recounted . . . violated Title VII's standard." 532 U.S. at 271. This single sentence in *Breeden*—which did not discuss *Ellerth* or *Faragher*—has been interpreted as precluding Title VII protections for reports of harassing conduct that falls short of an actual hostile work environment, *see, e.g.*, *George v. Leavitt*, 407 F.3d 405, 417 (D.C. Cir. 2005) (complaint about a few incidents of harassing behavior by co-workers was not protected activity, *citing Breeden*).

The Fourth Circuit assumed, as have some other lower courts, that *Breeden* held that a plaintiff relying on section 704(a) must, at the least, show that he or she could reasonably have believed that the actions complained of had already created a hostile work environment or otherwise violated Title VII. Had *Breeden* so held, however, it would have effectively overturned, *sub silentio*, this Court's carefully crafted decisions in *Ellerth* and *Faragher* encouraging employees to report incidents of sexual or racial harassment "before it becomes severe or pervasive." Such reports by definition would always occur before the harassment complained of was unlawful, and often would occur before a reasonable person would believe that the point of illegality had been reached. That this Court did not intend in *Breeden* to overturn this pivotal aspect of *Ellerth* and *Faragher* is confirmed by this Court's post-*Breeden* decision in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), which quoted with approval the stated intent in *Ellerth* to encourage employees to complain "before" harassing behavior has created a hostile work environment. 542 U.S. at 145.

Nonetheless, the uncertainty that has been generated by *Breeden* regarding the relationship of section 704(a), *Ellerth* and *Faragher* is an additional consideration that warrants

review by this Court. Only this Court can address and resolve the tension among these decisions.

II. THE FOURTH CIRCUIT'S REJECTION OF JORDAN'S RACE DISCRIMINATON CLAIM IS CONTRARY TO THIS COURT'S DECISION IN *SWIERKIEWICZ V. SOREMA N.A.*

The second issue presented by this petition challenges an established Fourth Circuit pleading rule that embodies the same fatal flaw condemned by this Court in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). The Fourth Circuit has imposed its own standard, akin to Fed. R. Civ. P. 9(b)'s standard of "particularity," to dismiss complaints that were proper under the notice pleading standard of Fed. R. Civ. P. 8.

The amended complaint alleged that the respondents had "fired [Jordan] for reporting Farjah's 'black monkeys' comment 'because he is African-American,' and that his 'race was a motivating factor' in his discharge." (App. 43a.) That factual assertion, if proven at trial, would unquestionably constitute a violation of section 1981. (*Id.* at 20a.)

In the Fourth Circuit, however, such a complaint resting on a straightforward assertion of an unlawful motive is insufficient as a matter of law. Rather, a complaint must go further and set forth specific additional facts that "provide . . . support for the violation." (App. 22a.) "A complaint purporting to describe the events justifying relief must . . . demonstrate that relief can be granted in those circumstances." (*Id.* at 21a.) In so holding, the Court of Appeals was applying a rule previously established by the Fourth Circuit that—at least in discrimination cases—a plaintiff cannot merely assert the existence of an unlawful motive:

> Allegations that the employer discriminated against the plaintiff "because of her race and sex" [are] not suf-

> ficient to allege a claim when the facts of the complaint d[o] not support the . . . allegation.

(App. 20a) (*quoting Bass v. E.I Dupont de Nemours & Co.*, 324 F. 3d 761, 765 (4th Cir. 2003)).[12]

Applying this pleading standard, the Court of Appeals dismissed Jordan's complaint because that court believed that the existence of the asserted unlawful motive could not fairly be inferred from any of the other factual allegations in the complaint. Except for the actual allegation of a discriminatory purpose—an allegation insufficient by itself in the Fourth Circuit—"[t]here is . . . no basis in the complaint to conclude that Jordan, as a complaining black employee, was treated differently from a white complaining employee." (App. 23a.) "[T]he 24 paragraphs of facts that are made part of [the racial discrimination count] provide no support for the [asserted] violation, just as was the case in *Bass*. . . . [W]e cannot discern in his claim any way that Jordan's race factored into his termination." (*Id.* at 22a.)[13]

Five members of the Fourth Circuit properly concluded that the heightened pleading requirement applied by the panel (and district court) in this case is inconsistent with this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002):

> [T]he panel majority's Rule 12(b)(6) ruling on Jordan's § 1981 claim contravenes controlling Supreme Court precedent in *Swierkiewicz* . . . . The Court there con-

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[12] This same Fourth Circuit rule was also applied in *Dickson v. Microsoft Corp.*, 309 F. 3d 193, 213 (4th Cir. 2002) and *Iodice v. United States*, 289 F. 3d 270 (4th Cir. 2002).

[13] Similarly, Judge Niemeyer, who authored the panel decision, explained in an opinion supporting the denial of rehearing *en banc* that the fatal defect of the complaint was that it "failed to demonstrate any basis from which to conclude that [Jordan's] own race 'played any role in his termination.'" (App. 53a) (emphasis omitted).

> cluded that Swierkiewicz's bare allegation that an adverse employment action was taken "on account of" a prohibited ground was sufficient, under Rule 12(b)(6), to state a claim upon which relief can be granted. . . . In so ruling, the Court expressly rejected the contention that Swierkiewicz's complaint did not state a valid claim because it was "based on conclusory allegations of discrimination." . . . The panel majority has nevertheless ruled that Jordan's allegation (that he was fired "because he is African-American" and that his "race was a motivating factor" . . .) fails to state a claim on which relief can be granted, even though Jordan's allegation is materially indistinguishable from the allegation at issue in *Swierkiewicz*. To make matters worse, the majority based its Rule 12(b)(6) ruling on the very reason rejected by the Court in *Swierkiewicz* . . . . This result simply cannot be reconciled with the Court's decision in *Swierkiewicz*.

(App. 55a-56a.)

Indeed, the Fourth Circuit rule applied in the instant case is even worse than the Second Circuit pleading standard rejected in *Swierkiewicz* itself. The Second Circuit only required that a discrimination plaintiff allege specific facts from which the trier of fact could infer the existence of a prima facie case; the Fourth Circuit requires yet more, that the complaint allege facts which would support an actual finding of discrimination. The five dissenters in the Fourth Circuit correctly objected that

> [b]y requiring employees to plead with particularity their claims of employment discrimination, the panel majority has arrogated to our Court the power to overrule, *sub silentio*, the liberal pleading standard of Rule 8(a) in favor of our own notions of effective procedure.

(App. 57a.)

In his dissent from the original panel decision, Judge King objected that the panel majority "brings us into direct conflict with Supreme Court precedent." (App. 45a.)

> [T]he majority today announces that, in order to comply with Rule 8(a), Jordan must detail—in his complaint—all of the specific facts from which a reasonable jury could conclude that race entered into IBM's decision to fire him. Such a requirement simply cannot be reconciled, however, with the "fair notice" standard reiterated by the Court in *Swierkiewicz*, as it collapses into Rule 9(b)'s more rigorous requirement that causes of action for fraud or mistake be pleaded with particularity.

(App. 44a.)

Even the heightened pleading required by Rule 9 for fraud permits such matters as "intent" to be pled generally. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.") The dissent was correct, and review by this Court is warranted.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed July 5, 2006]

No. 05-1485
CA-04-1091-8-DKC

ROBERT L. JORDAN,
Plaintiff-Appellant,

v.

ALTERNATIVE RESOURCES CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendants-Appellees,

THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; PUBLIC JUSTICE CENTER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amici Supporting Appellant.

On Petition for Rehearing

The appellant has filed a petition for rehearing.

The Court grants the petition for rehearing and vacates the opinion and judgment entered on May 12, 2006.

Entered at the direction of Judge Niemeyer with the concurrences of Judge Widener and Judge King.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1485

ROBERT L. JORDAN,
Plaintiff-Appellant,

v.

ALTERNATIVE RESOURCES CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendants-Appellees.

THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; PUBLIC JUSTICE CENTER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amici Supporting Appellant.

March 14, 2006, Argued
May 12, 2006, Decided;
August 14, 2006, Decided on Rehearing

OPINION ON REHEARING

NIEMEYER, *Circuit Judge*:

When the news broke in October 2002 that police in Montgomery County, Maryland, had captured two black men suspected of being the snipers who had randomly shot 13 individuals, killing 10, in separate incidents over a period of weeks in Maryland, Virginia, and the District of Columbia, an IBM employee watching the news on television in one of IBM's Montgomery County offices exclaimed, "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f--k them." A fellow employee, Robert Jordan, who is black, was in the room at the time and heard the exclamation. Jordan was offended and discussed the

incident with two other coworkers, who told him that the employee had made similar comments before. Jordan then reported the incident to management. A month later Jordan was fired, purportedly because he was "disruptive," his position "had come to an end," and management personnel "don't like you and you don't like them."

Jordan sued IBM and Alternative Resources Corporation ("ARC"), alleging that they jointly were his employer, for retaliation in violation of Title VII of the Civil Rights Act of 1964, and for breach of contract, fraud, and violations of local employment laws. Pursuant to the motion of IBM and ARC, the district court dismissed the complaint by order dated March 30, 2005, under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted, and entered judgment on April 26, 2005. The court held that Jordan was not protected by Title VII from his employers' retaliation because no objectively reasonable person could have believed that, in reporting the incident to management, Jordan was opposing an unlawful hostile work environment.

Jordan appealed, and, for the reasons that follow, we affirm.

I

In his complaint, Jordan alleges that in October 2002, he was employed jointly by ARC and IBM in Montgomery County, Maryland, because of the business relationship between the companies. He had entered into an at-will employment relationship with ARC in December 1998 as a network technician and, before October 2002, had been assigned to work at the IBM office in Gaithersburg, Montgomery County, Maryland.

Jordan alleges that, while in the network room at IBM's office on October 23, 2002, he heard his co-worker, Jay Farjah, who was watching television, exclaim—not directly

to Jordan but in his presence—"They should put those two black monkeys in a cage with a bunch of black apes and let the apes f--k them." Farjah was speaking to the television in response to a report that John Allen Muhammad and Lee Boyd Malvo had been captured.*

Over a period of three weeks, Muhammad and Malvo shot 13 people in public places in the greater Washington, D.C. metropolitan area from hidden positions. They killed 10 people and seriously wounded 3. Soon after the snipers' names and a description of their car were released by Montgomery County police late on October 23, Malvo and Muhammad were arrested. Jordan and Farjah were watching this breaking news report on a television at the IBM facility. In his complaint, Jordan states that he was offended by Farjah's statement and reported it to two IBM supervisors, Mary Ellen Gillard and C.J. Huang, explaining that he believed that Farjah should not utter racist comments in the office. After Gillard spoke with Farjah, who claimed that he only said, "They should put those two monkeys in a cage," Jordan told Gillard he was going to raise his complaint with Ron Thompson, IBM's site manager. Jordan also complained to ARC manager Sheri Mathers.

Jordan alleges that during the month following his complaints about Farjah's inappropriate statement, Gillard delayed Jordan's work shift by two-and-a-half hours and gave him additional work assignments. Jordan also alleges that Huang made a derogatory remark and gestured toward Jordan at an office Thanksgiving party. On November 21, 2002, ARC manager Mathers telephoned Jordan and fired him

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* Jordan's complaint alleges that Jordan and Farjah were watching the television report "immediately" after Muhammad and Malvo's capture on "October 23." While Montgomery County police identified Muhammad and Malvo late in the evening of October 23, 2002, the two were not captured until the early morning hours of October 24, 2002. This discrepancy, however, is immaterial, and we assume what has been alleged in the complaint to be true for purposes of reviewing the dismissal order.

because, as Jordan alleges, he was "disruptive," his position "had come to an end," and IBM employees and officials "don't like you and you don't like them."

Alleging retaliatory discharge in violation of 42 U.S.C. § 2000e-3(a), 42 U.S.C. § 1981, and related state laws, Jordan sued IBM and ARC based on his claim that they fired him for complaining about Farjah's statement. IBM and ARC filed a motion under *Federal Rule of Civil Procedure 12(b)(6)*, alleging that the complaint failed to state a claim upon which relief can be granted. While the defendants' motion to dismiss was pending, Jordan filed a motion for leave to file an amended complaint to add an allegation that after hearing Farjah's remark, he discussed it with several co-workers, and "[a]t least two of the co-workers told Jordan that they had heard Farjah make similar offensive comments many times before." Jordan also proposed to add new state law claims for breach of contract, fraud, and wrongful discharge.

The district court granted the defendants' motion to dismiss, and in doing so not only ruled on the original complaint, but also considered the proposed amended complaint, concluding that it too failed to state a claim upon which relief could be granted. The court held that IBM and ARC could not be liable for retaliation because "Plaintiff has failed to allege that he engaged in a statutorily protected activity." As the court explained, "A plaintiff bringing a claim under the opposition clause of Title VII must at a minimum have held a reasonable good faith belief at the time he opposed an employment practice that the practice was violative of Title VII" (internal quotation marks, alterations, and citation omitted). The court concluded that "Farjah's comment, which [Jordan] does not allege was directed at him, simply is not such a violation." Addressing the proposed amended complaint, the court stated that the additional facts alleged

> still [do] not make "objectively reasonable" Plaintiff's belief that Defendants engaged in unlawful employment

> practices by allowing an abusive working environment to persist . . . [N]o facts are alleged to indicate that these prior comments, taken alone or in conjunction with the incident involving Plaintiff, constituted a hostile work environment. Plaintiff's amended complaint does not specify the frequency, severity, or nature of the prior comments, nor even any aspect of their content; it merely states that "two of the co-workers told Jordan that they heard Farjah make similar offensive comments many times before."

From the district court's April 26, 2005 judgment dismissing Jordan's complaint, Jordan filed this appeal.

II

Our review of an order granting a motion to dismiss filed under *Federal Rule of Civil Procedure 12(b)(6)* is *de novo* and focuses only on the legal sufficiency of the complaint. In conducting this review, we "take the facts in the light most favorable to the plaintiff," but "we need not accept the legal conclusions drawn from the facts," and "we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000); *see also Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

III

At the heart of Jordan's complaint is the allegation that IBM and ARC retaliated against him because he complained about Farjah's racist exclamation, made in response to a television report that the two snipers had been captured. Farjah's comment, directed at the news report, was the only time that Jordan had ever heard a racist comment from Farjah. Moreover, Jordan does not complain of any other similar statements made to him by others or heard by him in the workplace. He contends, however, that his complaint

about Farjah's comment involved an "incipient violation" of Title VII and therefore is protected by § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) (prohibiting discrimination when an employee has opposed a practice made unlawful by Title VII). Otherwise, as Jordan argues, "[F]ew workers would accept this early-reporting invitation [to report violations] if they knew they could be fired for their efforts."

IBM and ARC contend that Title VII protects an employee against retaliation for opposing workplace conduct only if the employee had both a subjective belief and an objectively reasonable belief that the employer had engaged in activity that violated the discrimination statutes. The defendants argue that on the facts alleged in this complaint, Jordan's belief could not have been objectively reasonable because "a plethora of authority holds squarely to the contrary . . . [that] a single verbal incident in the workplace, no matter how racially charged, is [in] sufficient to create a racially hostile work environment." They assert that "because the law on this point is so clear, Jordan [could not] have held an objectively reasonable belief to the contrary."

The relevant provision of Title VII reads:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter.

42 U.S.C. § 2000e-3(a). The plain meaning of the statutory language provides protection of an employee's opposition activity when the employee responds to an actual unlawful employment practice. Reading the language generously to give effect to its purpose, however, we have also held that opposition activity is protected when it responds to an employment practice that the employee *reasonably believes* is unlawful. *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 406-07 (4th Cir. 2005) (citing *United States ex rel. Wilson v.*

Graham County Soil & Water Conservation Dist., 367 F.3d 245, 255 (4th Cir. 2004), *vacated on other grounds* 545 U.S. 409, 125 S. Ct. 2444, 162 L. Ed. 2d 390 (2005); and *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)); *see also Peters v. Jenney*, 327 F.3d 307, 320-21 (4th Cir. 2003). Because the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam) (resolving the objective reasonableness of Title VII plaintiff's beliefs through the summary judgment procedure).

The "unlawful employment practices" that an employee can oppose, and thereby be protected from retaliation, include practices that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Such discrimination includes maintaining a racially hostile work environment, i.e., a "workplace . . . permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (internal quotation marks omitted)). Courts determine "whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (quoting *Harris*, 510 U.S. at 23); *see also Breeden*, 532 U.S. at 270 ("[W]orkplace conduct is not measured in isolation"). "A

recurring point in these opinions is that simple teasing, off-hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher*, 524 U.S. at 788 (citations and internal quotation marks omitted).

Unlike other, more direct and discrete unlawful employment practices, hostile work environments generally result only after an accumulation of discrete instances of harassment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct . . . Such claims are based on the cumulative effect of individual acts"); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001).

In this case, both Jordan and the defendants agree that Jordan's complaint to IBM and ARC's managers was opposition activity and that the only conceivable unlawful employment practice that Jordan could have been opposing was a hostile work environment. Thus, the question reduces to whether Jordan complained about an actual hostile work environment or, if there was not one, whether Jordan could reasonably have believed there was one.

A

On the question of whether Jordan was complaining of an actual hostile work environment made unlawful by Title VII, we conclude that he was not. While Farjah's comment on October 23, 2002 (or October 24) was unacceptably crude and racist, it was an isolated response directed at the snipers through the television set when Farjah heard the report that they had been arrested. Because the remark was rhetorical insofar as its object was beyond the workplace, it was not directed at any fellow employee. Moreover, it was a singular and isolated exclamation, having not been repeated to Jordan

or in his presence before or after October 23, 2002. Jordan does not and cannot allege in his complaint that Farjah's comment altered the terms and conditions of his employment. Based on all that Jordan knew, Jordan concluded that the remark reflected unacceptable racism and should not have been made. And while we agree with Jordan's sentiment, we conclude that such an allegation is a far cry from alleging an environment of crude and racist conditions so severe or pervasive that they altered the conditions of Jordan's employment with IBM or ARC. The complaint does not describe a workplace permeated by racism, by threats of violence, by improper interference with work, or by conduct resulting in psychological harm. *See Faragher*, 524 U.S. at 787-88.

B

The question of whether Jordan could *reasonably have believed* that he was complaining of a hostile work environment made unlawful by Title VII requires more discussion and must be determined through an objective-reasonableness inquiry, as exemplified by our decision in *EEOC v. Navy Federal Credit Union*, 424 F.3d 397 (4th Cir. 2005).

In *Navy Federal*, management had concocted a secret and elaborate scheme to create an unfavorable personnel record and then, based on the fabricated record, fire a black female employee in retaliation for her internal complaints about race, sex, and age discrimination. The employee's supervisor refused to participate in the plan. When the supervisor's employment was terminated because the supervisor resisted management's plan, the EEOC sued Navy Federal for retaliation. We held that the supervisor's resistance and refusals were opposition activity protected by § 2000e-3(a) even though Navy Federal's management had not yet accomplished its discriminatory scheme by firing the black female employee. Thus, even though Navy Federal probably was not yet liable for actually discriminating against the black female employee, we held that the supervisor nonetheless

held "a reasonable belief that Navy Federal was unlawfully retaliating" against the employee because management "[had] *set in motion a plan* to terminate [the black female employee] in retaliation for her complaints of racial discrimination, while at the same time seeking to conceal their improper motives." *Navy Federal*, 424 F.3d at 407 (emphasis added). Stated otherwise, because there was no question that Navy Federal's plan, if accomplished, would have resulted in a Title VII violation and management had unmistakably begun to implement the plan, we held that the supervisor could reasonably have believed that she was opposing an employment action made unlawful by Title VII. Indeed, but for the supervisor's opposition, Navy Federal's management would have succeeded in their attempted unlawful discrimination.

In this case, Jordan argues that he had an objectively reasonable belief that Title VII was about to be violated because "had [Farjah] continued, unabated, his conduct would at some point have ripened into [a] racially hostile work environment." While in the abstract, continued repetition of racial comments of the kind Farjah made might have led to a hostile work environment, no allegation in the complaint suggests that a plan was in motion to create such an environment, let alone that such an environment was even likely to occur. *Navy Federal* holds that an employee seeking protection from retaliation must have an objectively reasonable belief in light of all the circumstances that a Title VII violation has happened or is in progress. Under § 2000e-3(a) as construed by *Navy Federal*, we cannot simply *assume*, without more, that the opposed conduct will continue or will be repeated unabated; rather, the employee must have an objectively reasonable belief that a violation is actually occurring based on circumstances that the employee observes and reasonably believes.

When considering the facts alleged by Jordan in his complaint, no objectively reasonable person could have believed

that IBM's Montgomery County office was in the grips of a hostile work environment or that one was taking shape. That is, no objectively reasonable person could have believed that the IBM office was, or was soon going to be, infected by severe or pervasive racist, threatening, or humiliating harassment. Jordan had been employed at the location for four years and had not complained of any racist or abusive incidents. On the day in question, Jordan overheard Farjah speak a single abhorrent slur prompted by—though not excused by—a breaking news report. As Jordan acknowledges in his complaint, Farjah was in Jordan's presence at the time, but he was not talking directly to Jordan or to any employee. Although Jordan could reasonably have concluded that only a racist would resort to such crudity even in times when emotions run high, the mere fact that one's *coworker* has revealed himself to be racist is not enough to support an objectively reasonable conclusion that the *workplace* has likewise become racist.

Jordan's proposed amended complaint added allegations that, after hearing Farjah's comment, Jordan spoke to several co-workers and two of them referred to some similar statements made by Farjah in the past. But Jordan never experienced them, nor did he witness a workplace affected by them. From his coworkers' vague references, Jordan did not know about where or when such statements were made, or what Farjah said except that the statements were similar. There is, moreover, no allegation that any of those earlier statements interfered with Jordan's or any other employee's work performance, were complained about, or gave rise to a hostile environment at Jordan's workplace. Although these observations tended to confirm that Farjah makes racist comments, no allegation reasonably supports the inference that they were likely to recur at a level sufficient to create a hostile work environment. Jordan rests his case on the assumption that Farjah would repeat the remarks that he made on October 23 more frequently than his past history indicates; Jordan makes no allegations justifying this assumption.

Arguing for a rule that would protect virtually any complaint about a racist remark, Jordan maintains that, as a policy matter, "it is imperative that employees report harassment early" and that, in this case, he "was acting to prevent a hostile environment from arising." He argues that the *Navy Federal* reasonableness requirement stands in tension with the early reporting policy incentives discussed in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher*, 524 U.S. at 806, especially because we have held that employers are not liable for an employee's unlawful harassment of another employee if the harassed employee has unreasonably refused to report or has unreasonably waited many months before reporting a case of actual discrimination. *See Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267-68 (4th Cir. 2001); *see also Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269-70 (4th Cir. 2001) (holding that an employee need not forestall reporting a workplace harasser in order to "collect evidence" against him so long as the conduct was actionable, i.e., that it was unwelcome, based on the employee's gender, "*and sufficiently pervasive or severe to alter the conditions of employment*") (emphasis added)). Employees, Jordan argues, are left in "a double-bind—risking firing by reporting harassing conduct early, or waiting to report upon pain of having an otherwise valid claim dismissed."

Jordan's dilemma, that the law is inconsistent by both encouraging and discouraging "early" reporting, is presented too abstractly. The strong policy of removing and preventing workplace discrimination can and does coexist with *Navy Federal's* objective reasonableness standard—a standard that pervades Title VII jurisprudence. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006). If Jordan were right, our opinion in *Navy Federal* would have been considerably shorter. We would not have provided an analysis of the reporting employee's reasonable belief in the existence of a Title VII violation.

Rather, we would have concluded more simply that, by reporting on her supervisor's uncompleted yet abstractly illegal scheme, the *Navy Federal* plaintiff was protected by the policy favoring early reporting. *Navy Federal* recognized, however, that despite this policy, Congress did not write the antiretaliation provision in Title VII to protect employees who, with no more than good faith, complain about conduct that no reasonable person would believe amounts to an unlawful employment practice.

Jordan overlooks the fact, which is fundamental to Title VII jurisprudence, that there is a difference between an isolated racial slur, which is always and everywhere inappropriate, and the sort of severe or pervasive conduct that creates a hostile work environment. "Title VII does not prohibit all verbal or physical harassment in the workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *see also id.* (reasoning that Title VII will not become "a general civility code for the American workplace" so long as courts pay "careful attention to the requirements of the statute"). Although the distinction between a racial slur and a hostile workplace may at a highly abstract level seem a difficult one for employees to manage, the distinction should not be conceived of in the abstract but rather in light of the *Navy Federal* objective reasonableness standard, which serves to protect an employee's judgment in a close case. Objectively reasonable employees can and do recognize that not every offensive comment will by itself transform a workplace into an abusive one. Therefore it sometimes will not be reasonable for an employee to believe that the isolated harassing event he has witnessed is a component of a hostile workplace that is permeated with discriminatory intimidation, ridicule, and insult.

Moreover, Jordan's dilemma is at its core a false dilemma, comparing the qualitative requirement of objective reasonableness in reporting with the laches concept espoused in

Faragher and developed in *Matvia*. *See Faragher*, 524 U.S. at 807 (holding that an employee cannot "*unreasonably* fail[]to take advantage of any preventive or corrective opportunities" (emphasis added)); *Matvia*, 259 F.3d at 270 (holding that an employee who waited nearly three months after the first actionable incident of sexual harassment waited too long). When he argues that he risks being fired by reporting *too early*, he refers to reporting when there is *insufficient conduct* about which to complain; but when he argues that he risks dismissal of his claim by reporting *too late*, he refers to the inordinate *time delay* as described in *Matvia*. The concepts are not comparable and create no dilemma.

The time constraint of *Matvia*, moreover, is of limited applicability in any comparison because it only prevents an employee who waited unreasonably long to take advantage of an employer's antiharassment policy from overcoming the employer's affirmative defense based on the existence of that policy under *Ellerth* and *Faragher*. But the employee can belatedly report discriminatory conduct and still be protected from retaliation. The employee enjoys that immunity so long as he reports an unlawful employment practice or an employment practice that an objectively reasonable employee would believe is unlawful. Thus, an employee who unreasonably delays acting on his discrimination claim and thereby loses his right to a judicial remedy under *Matvia* still has the incentive to report the unlawful conduct, under the protection of the antiretaliation statute, because of the increased likelyhood that his employer will remedy the conduct extrajudicially in order to maintain the effectiveness of its antidiscrimination policy.

As the law stands, employees are not subject to conflicting incentives. Complaining employees are protected by Title VII once they have an objectively reasonable belief that a Title VII violation has occurred, and they have a reasonable amount of time in which to bring their concern to their

employers' attention if they want to protect their right to sue their employers. Only at an impermissibly high level of generality, where meaningful distinctions can no longer be observed, can it be argued that the law inconsistently encourages employees to report and at the same time not to report violations, and Jordan's argument, if accepted, would lead to the adoption of a new rule that protects employees who have no reasonable belief that a Title VII violation has occurred, contrary to the statutory limits of the law. When considered in actual application, the objective reasonableness standard *protects* the reporting employee.

Jordan's argument that the *Navy Federal* rule creates a perverse incentive for employers to "fire workers quickly before they have [Title VII] claims" is hyperbolic. Employers who trap employees by firing those who use their antiharassment reporting procedures could very well lose their affirmative defense in cases where employees do not report suspected violations, for this circuit requires that employers prove, by a preponderance of the evidence, that their antiharassment policies are "effectively enforced" before they may use such policies to defeat discrimination claims. *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 299 (4th Cir. 2004).

Congress limited the scope of retaliation claims, and *Navy Federal* amply, indeed generously, protects employees who reasonably err in understanding those limits. We are unwilling to extend *Navy Federal* and establish a rule tantamount to a statutory civility code. Accordingly, we affirm the district court's conclusion that Jordan's complaint in this case, as well as his proposed amended complaint, fails to state a claim upon which relief can be granted.

IV

The remaining counts of Jordan's complaint, which are grounded essentially on the same core allegations that support his Title VII claim, fail to state claims upon which relief can

be granted for reasons similar to or deriving from those supporting dismissal of his Title VII claim.

With respect to his claims for unlawful retaliation under 42 U.S.C. § 1981 and Montgomery County Code § 27-19(c)(1), Jordan acknowledges that the applicable principles are the same as those for determining liability under Title VII. *See Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 188 (4th Cir. 2004) (with respect to § 1981); *Magee v. Dan-Sources Technical Servs., Inc.*, 137 Md. App. 527, 769 A.2d 231, 252-53 (Md. Ct. Spec. App. 2001) (with respect to the Montgomery County Code). Because there is no actionable Title VII retaliation alleged, these claims based on the same analysis must also fail.

V

Jordan also contends that the district court erred in dismissing his discrimination claim under 42 U.S.C. § 1981—as distinct from his retaliation claim—for failing to state a claim upon which relief can be granted. Citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), he argues that under notice pleading he may state a claim upon which relief can be granted by relying on his complaint, which alleges 24 paragraphs of facts and concludes with the allegation that "his race was a motivating factor" in being fired. Because the concluding allegation is supported by neither the alleged facts nor the fair inferences to be drawn from them, the defendants contend that it is no more than a conclusory allegation that "does not satisfy *any* pleading standard." Jordan responds that he does not rely on the single allegation that his race was a motivating factor and that the single allegation should not be read in isolation. The count alleging a § 1981 discrimination claim, he states, "incorporates all prior factual allegations detailed in the complaint," and the final conclusory allegation follows from the facts alleged. He maintains that his complaint is significantly more detailed than that upheld in *Swierkiewicz*.

In alleging his § 1981 discrimination claim, which is Count VII of his complaint, Jordan did incorporate by reference paragraphs 1-24 of the complaint, and thus, as he claims, these paragraphs constitute the facts of Count VII. The 24 paragraphs, which constitute the only factual allegations of the complaint, begin with the summary that the defendants fired Jordan "because he complained about conduct that he reasonably believed constituted a hostile work environment or would, if unabated, constitute such an environment." After alleging jurisdiction and describing the parties, he sets forth the specific events that formed the grounds of his complaint. First, he describes the event on October 23, 2002, when Farjah made the racist remark while he and Farjah were standing in IBM's network room watching a television report about the capture of Malvo and Muhammad. He alleges also that on that same day he reported the remark to coworkers and to three different managers. He related how one of the managers reported back that Farjah denied making the remark in the form alleged by Jordan. Jordan thereafter reported the remark to another manager. Finally Jordan alleges that the defendants retaliated against him for reporting the remark, first by changing his schedule and his job assignments and then, about a month later, by firing him. The complaint alleges that when Jordan was notified about being fired, the defendants gave as their reasons that Jordan was "disruptive," his position "had come to an end," and that "IBM 'don't like you and you don't like them.'" Jordan alleges that these reasons were a pretext and that the real reason for which he was fired was "his opposition to Farjah's racially offensive statement."

After setting forth these facts and incorporating them into Count VII, the complaint concludes with the allegation that "Jordan's race was a motivating factor in the conduct and decisions of IBM and/or ARC."

In evaluating Count VII on the defendants' motion to dismiss under Rule 12(b)(6), the district court read it as alleging that Jordan was fired for reporting a racist remark but as failing to demonstrate any basis from which to conclude that his own race "played any role in his termination." The court observed that the only person alleged to have engaged in racist conduct was Farjah, and "Farjah [was] not alleged to have contributed to Jordan's termination." The court concluded:

> His § 1981 claim is therefore insufficient as a matter of law. Although no facts alleged thus far have indicated that Defendants discriminated against Plaintiff because of his race, the court will permit Plaintiff to amend this count to allege any such facts.

Jordan elected to rest on his complaint as written, advising the district court that he would not avail himself of the opportunity to amend and requesting the court to enter a final judgment on his § 1981 discrimination count.

Only now, for the first time in his reply brief on appeal, does Jordan provide a theory of how his complaint purports to state a claim of racial discrimination under § 1981. He states:

> The facts in this case raise a strong inference of retaliation, but they also raise an inference of discrimination based on race. When appellees learned that an IBM employee, Jay Farjah, made a crude racist remark to Robert Jordan, they took no action against Farjah and instead fired Jordan, an African-American employee who asked them to stop the offensive behavior. This raises an inference that the relevant managers tolerated racist comments, or even condoned them. And since Farjah had made similar comments many times before, a jury could infer that this conduct was nothing new for the managers. Tolerating or condoning racist comments in the workplace is itself evidence of racial bias, . . . and

> evidence of bias, along with the unexplained firing of a good employee, is a sufficient factual basis for a jury to conclude that Jordan was treated more harshly in his situation than he would have been if he were white.

For a § 1981 discrimination claim, Jordan must allege that he is a member of a racial minority; that the defendants' termination of his employment was *because of his race*; and that their discrimination was intentional. *See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). In his complaint, however, Jordan has not demonstrated how Farjah's racism could be imputed to the defendants on a basis by which relief under § 1981 could be afforded. Instead of amending his complaint to state a viable claim, Jordan simply rested on his illogical conclusory statement that his race was a "motivating factor" for his firing, without explaining how that conclusion is consistent with the allegations that he has made. In just such circumstances, we have rejected reliance on similar conclusory allegations, particularly when the plaintiff, like Jordan, has purported to set forth in detail the facts upon which his claims are based. *See Bass*, 324 F.3d at 765 (holding that conclusory allegations that the employer discriminated against the plaintiff "because of her race and sex" were not sufficient to allege a claim when the facts of the complaint did not support the conclusory allegation); *see also Eastern Shore Mkts.*, 213 F.3d at 180 (in reviewing a Rule 12(b)(6) motion, "[w]e need not accept the legal conclusions drawn from the facts").

Jordan first defends his purported allegation of a § 1981 discrimination claim by contending that it conforms to the lenient standards of notice pleading permitted by the rules and affirmed in *Swierkiewicz*. But the district court's dismissal order was not premised on Jordan's failure to give notice of his claim to the parties. Rather, it concluded that what was alleged failed to state a discrimination claim under § 1981 upon which relief can be granted. Even with notice

pleading, a complaint purporting to describe the events justifying relief must nonetheless demonstrate that relief can be granted in those circumstances.

Rule 8(a) of the Federal Rules of Civil Procedure provides that a complaint filed in federal court must contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). And Rule 12(b)(6) authorizes dismissal of a complaint that "fails to state a claim upon which relief can be granted." The holding in *Swierkiewicz* does not eliminate the need to comply with these rules. In *Swierkiewicz* the Supreme Court held that the Second Circuit's "heightened pleading standard," requiring a civil rights plaintiff to plead facts that constitute a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), demanded too much of the pleader. The Court observed that the plaintiff's case might not even depend on a demonstration of the *prima facie* case under *McDonnell Douglas*. As the Court stated:

> [U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a *prima facie* case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a *prima facie* case.
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> * * *
>
> It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

534 U.S. at 511-12. But that holding, which recognizes that the *prima facie* case is a standard of proof distinct from the essential elements of a cause of action, left untouched "the burden of a plaintiff to allege facts sufficient to state all the

elements of her claim." *Bass*, 324 F.3d at 765 (emphasis added); *see also Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) ("[T]he Supreme Court's holding in *Swierkiewicz v. Sorema* did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim" (internal citation omitted)).

Consequently, when a plaintiff's complaint sets forth facts in support of his claim for relief and tracks the language of the applicable cause of action, the legal conclusions "are not talismanic" because "it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage." *Bass*, 324 F.3d at 765. In *Bass*, the plaintiff pleaded that her employer discriminated against her "because of her race and sex." *Id.* (quoting the plaintiff's complaint). Yet she supported this allegation with "a story of a workplace dispute regarding her reassignment and some callous behavior by her superiors," which did "not seem to have anything to do with gender, race, or age harassment." *Id.* Construing the *Bass* plaintiff's complaint in her favor, we were unable to determine how her story involved any discrimination "because of her race and sex."

Jordan's count for a § 1981 discrimination claim is similarly deficient. The count conclusorily states that the defendants violated § 1981 because race was a motivating factor in his termination. Yet the 24 paragraphs of facts that are made part of that count provide no support for the violation, just as was the case in *Bass*. Like the district court, we cannot discern in his claim any way that Jordan's race factored into his termination.

To salvage his claim, Jordan argues for the first time on appeal that "inferences" may be drawn from his complaint to support a § 1981 discrimination claim. He states (1) that his managers must be racist because they did not fire the racist but did fire him, and (2) that in firing him, his managers treated him more harshly than they did white employees.

These matters, however, are not alleged in the complaint, and they cannot now be taken as amendments to the complaint. Indeed, the district court gave Jordan ample leeway and opportunity to amend his complaint, an opportunity that Jordan refused.

Moreover, these new allegations are not fair inferences inasmuch as they are mere speculation and argument. It does not follow that a manager who does not fire an alleged racist is therefore himself a racist, and it does not follow that a racist who fires an employee did so because of his racism. There is also no basis in the complaint to conclude that Jordan, as a complaining black employee, was treated differently from a white complaining employee. Indeed, there is no suggestion that any employee other than Jordan complained to management about a racist comment.

Jordan's "inferences" thus are simply unwarranted inferences that do not provide support for a statement of claim. *See Eastern Shore Mkts.*, 213 F.3d at 180.

Accordingly, we affirm the district court's order dismissing Jordan's discrimination claim under 42 U.S.C. § 1981.

VI

Jordan also claims that "IBM's conduct constituted other unlawful behavior" as described in Montgomery County Code §§ 27-19(c)(2)-(c)(4). Section 27-19(c)(2) prohibits assisting in, compelling, or coercing discriminatory practices prohibited by the Code. The only discriminatory practice prohibited by the Code that Jordan alleges is § 27-19(c)(1) retaliation, but because he has not stated a claim for which relief can be granted under that provision, he cannot state an assistance claim under § 27-19(c)(2). The same reasoning compels the dismissal of Jordan's § 27-19(c)(3) claim, for obstructing or preventing enforcement of the Code, and § 27-19(c)(4) claim, for attempting discriminatory practices prohibited by the Code.

VII

Jordan also purports to assert claims for fraudulent inducement or breach of contract. He alleges that IBM and ARC, by promulgating anti-harassment policies outlining steps for alerting supervisors to workplace harassment, encouraged him to report Farjah's comment and then fired him for doing so.

In Maryland, a fraud claim must allege that a misrepresentation was made for the purpose of defrauding the plaintiff and that the misrepresentation's falsity was known to the defendant. *See Gross v. Sussex, Inc.*, 332 Md. 247, 630 A.2d 1156, 1161 (Md. 1993). But Jordan fails to allege that the defendants, in creating and distributing their policies, acted with a purpose to defraud and with the knowledge that representations made by them were false. The fraud claim must fail for lack of those essential elements.

Jordan's claim for breach of contract must fail because IBM's and ARC's anti-discrimination policies were not enforceable contracts. While Jordan concedes this fact, he argues that we should apply promissory estoppel to "prevent injustice." Maryland courts, which disapprove of the term "promissory estoppel," have incorporated the *Restatement (Second) on Contracts* to adopt the analogous doctrine of "detrimental reliance," a tort that does not sound in fraud. *See Pavel Enterprises, Inc. v. A.S. Johnson Co.*, 342 Md. 143, 674 A.2d 521, 532 (Md. 1996); *id.* at 533 n.29. To show detrimental reliance on a promise, Jordan must allege a clear and definite promise. But the policies of both IBM and ARC *expressly disclaim* creating enforceable obligations. Moreover, the policies do not clearly promise that employees will not be discharged if they report conduct they believe to be harassment.

VIII

Jordan also claims that IBM tortiously interfered with his ARC employment contract, pleading this claim in the

alternative on the assumption that IBM was not his joint employer. In response to the district court's dismissal of this claim because Jordan was an at-will employee, Jordan now argues that his ARC employment was contractual "in nature," albeit not a contract for a fixed term and thus terminable at will.

In *Macklin v. Robert Logan Assocs.*, 334 Md. 287, 639 A.2d 112, 113 (Md. 1994), the Maryland Court of Appeals noted the existence of a "broader right" that entitles a plaintiff to sue even when "no contract or a contract terminable at will is involved"—the right to be protected from interference with economic relations. Thus, Jordan's tortious interference claim must be analyzed as a claim for interference with economic relations. *See Alexander & Alexander, Inc. v. B. Dickson Evander & Assocs.*, 336 Md. 635, 650 A.2d 260, 268 n.13 (Md. 1994) ("Interference with a contract terminable at will is analyzed as interference with economic relations broadly, and not interference with a specific contract"). Interference with economic relations requires showing tortious intent and wrongful or improper conduct. *Macklin*, 639 A.2d at 119. In *Alexander & Alexander*, the Court of Appeals held that "wrongful or malicious interference with economic relations is interference by *conduct that is independently wrongful or unlawful*" and went on to identify such conduct as "violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith." 650 A.2d at 271 (emphasis added) (internal quotation marks omitted).

Jordan has not alleged any conduct that is independently unlawful and accordingly fails to state a claim upon which relief can be granted.

IX

Finally, Jordan alleges that he was wrongfully discharged.

Although the Maryland Court of Appeals acknowledges the general rule that an at-will employee can be fired at any time, it has also created an exception that an employer cannot fire an at will employee for a reason that violates a statute or public policy. *See Adler v. Am. Standard Corp.*, 291 Md. 31, 432 A.2d 464 (Md. 1981). In *Adler*, the court specifically held that the complaint must allege that the employee's discharge "contravened some clear mandate of public policy." *Id.* at 473. But such a claim may not become a substitute for violations of public policy for which a statute provides its own remedies. *See Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 561 A.2d 179 (Md. 1989).

While Jordan alleges that his discharge violates "Maryland public policy[, which] prohibits employers from punishing employees who report racially offensive behavior that they believe in good faith violates anti-discrimination laws," Maryland already provides statutory remedies for employees alleging retaliation, and those laws' objective criteria indicate that there is no public policy to protect employees simply for subjectively acting in good faith. The district court properly dismissed this claim also.

* * *

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

KING, *Circuit Judge*, dissenting:

My colleagues of the panel majority have today concluded that, as a matter of law, it was not reasonable for an African-American employee to think that the on-the-job remark made by his IBM coworker—"[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them"—warranted being reported to his employers as a potential Title VII violation. And, in the majority's view, Plaintiff Robert Jordan has not sufficiently alleged that IBM's decision to fire him for making that report was racially motivated. I disagree and write separately to elaborate on my position. First, in ruling that Jordan has not stated a Title VII retaliation claim, the majority has misconstrued the facts and misapplied the law, placing employees who experience racially discriminatory conduct in a classic "Catch-22" situation. Second, its conclusion that Jordan has not stated a claim of a racially discriminatory discharge is contrary to controlling Supreme Court precedent.[1]

I.

This proceeding is on appeal after having been dismissed under Rule 12(b)(6) for failure to state a claim upon which

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[1] By order of July 5, 2006, we unanimously granted panel rehearing, thereby vacating the panel majority's earlier decision, which had affirmed the district court's dismissal order, *see Jordan v. Alternative Res. Corp.*, 447 F.3d 324 (4th Cir. 2006), and from which I had dissented, *see id.* at 336 (King, J., dissenting). By its decision today, the majority has again affirmed the district court's dismissal order. In so doing, it has rewritten its earlier opinion to reduce the importance of the snipers' capture in its discussion of Jordan's Title VII claim (although the capture remains prominent in the majority's analysis of that claim), and in an endeavor to further explain its decision concerning Jordan's § 1981 discrimination claim, which had previously been relegated to two conclusory sentences, *see id.* at 334 (majority opinion). In these circumstances, I am disappointed that our panel rehearing has merely prolonged the decisional process, without altering the result reached.

relief can be granted. In reviewing such a ruling, we are obliged to accept the facts alleged by Jordan as true, and review those allegations in the light most favorable to him. *See Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 268 (4th Cir. 2005). A proper application of these principles undermines the majority's decision in this case.

In October 2002, Jordan, an employee of IBM and ARC since December 1998, was standing near his IBM co-worker, Jay Farjah, in a television room at their IBM worksite in Maryland. Amend. Compl. P9.[2] They were watching reports on the capture of two snipers (both African-American) who had terrorized the Washington, D.C. area that fall. *Id.* As they watched, Farjah loudly stated his position that "[t] hey should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them" (the "'black monkeys' comment"). *Id.* Immediately after Farjah made the "black monkeys" comment, Jordan reported it to other co-workers. Id. P10. Two of those coworkers related to Jordan that "they had heard Farjah make similar offensive comments many times before." *Id.* Armed with this knowledge, and pursuant to IBM's policy that its employees were obliged to report racially discriminatory conduct to management, Jordan advised C.J. Huang and Mary Ellen Gillard, two of his IBM managers, of the "black monkeys" comment. *Id.* at PP11-12. When Jordan requested that the IBM managers speak with Farjah and tell him "not to make such comments," the IBM managers directed Jordan to put the "black monkeys" comment in writing (and he obliged). *Id.* at P12. Huang then asked Jordan if he had considered the impact that his

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[2] The district court denied as futile Jordan's motion to amend. In so ruling, however, the court considered the allegations of the Amended Complaint together with those of the Complaint. At oral argument, IBM conceded that the Amended Complaint's allegations are before us in this appeal.

complaint might have on Farjah, and suggested that "Farjah may have been joking." *Id.* at P13.

Thereafter, Ms. Gillard reported to Jordan that Farjah admitted to having said "they should put those two monkeys in a cage," but that he denied having made the balance of his "black monkeys" comment. Amend. Compl. P15. Jordan then advised Gillard that he wanted to bring his complaint to the attention of Ron Thompson, IBM's site manager. *Id.* Jordan also discussed the comment with Sheri Mathers, an ARC manager. *Id.* at P14.

Jordan's working conditions took a downward turn immediately after he reported Farjah's "black monkeys" comment to IBM management. Amend. Compl. P16. Prior to reporting the comment, Jordan had been authorized to start his work day at 6:30 a.m., which permitted him to pick up his son after school. *Id.* Without notice or explanation, Gillard changed Jordan's work schedule, requiring him to report to work at 9:00 a.m. each day, thereby precluding him from picking up his son from school. *Id.* Jordan also received a sudden increase in his workload. *Id.* at P17. And at the office Thanksgiving party, "Huang made a crude, derogatory remark and gesture to Jordan." *Id.* Then, on November 21, 2002—about a month after he first complained to IBM's managers of Farjah's "black monkeys" comment—Jordan was fired from his job, at IBM's request. *Id.* at P19. According to the allegations, IBM had Jordan fired "because of his opposition to Farjah's racially offensive statement." *Id.* at P20. Furthermore, IBM's decision to retaliate against Jordan was made "because he is African-American," and his "race was a motivating factor." *Id.* at P42.

II.

To begin with, the severity of Farjah's racially hostile "black monkeys" comment merits our consideration. It is plain that a reference to our African-American fellow citizens

as "monkeys" reflects the speaker's deep hostility towards them—on the sole basis of their color. And it is equally clear that such comments constitute profound insults to our friends in the African-American community. By referring to African-Americans as "monkeys," the speaker plays on historic, bigoted stereotypes that have characterized them as uncivilized, non-human creatures who are intellectually and culturally inferior to whites. *See, e.g.*, Jennifer M. Russell, *On Being a Gorilla in Your Midst, or, the Life of One Blackwoman in the Legal Academy*, 28 Harv. C.R.-C.L.L. Rev. 259, 260 (1993) (discussing message conveyed by gorilla picture placed anonymously in mailbox of African-American law professor: "'Claim no membership to the human race. You are not even a sub-species. You are of a different species altogether. A brute. Animal, not human.'").[3] Indeed, our Court probably understated the impact of such racially charged references in recently observing that "'[t]o suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme.'" *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 298 (4th Cir. 2004) (quoting *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001)).

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[3] Professor D. Marvin Jones, who has researched and written extensively on the subject, has observed that:

> The Europeans . . . equated "the unknown" with the uncivilized, and uncivilized men with animals. Hence, it is not surprising that the early Roman historian Herodotus reported that Africa was filled with "dog eared men, and the headless that have eyes in their chests." The historical record is replete with examples of Europeans attributing animal characteristics to blacks, culminating in controversial conjecture originating in . . . seventeenth[-]century England that blacks had sprung from apes.

See D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 Geo. L.J. 437, 466 (1993).

In his "black monkeys" comment, Farjah openly opined that the "black monkeys" should be put in a "cage with a bunch of black apes" so that the "apes" could "fuck them." While we must endeavor to do so, our panel is scarcely qualified to comprehend the impact such a remark would have on the reasonable African-American listener. Suffice it to say that, in a single breath, Farjah equated African-Americans with "black monkeys" and "black apes," and implied a savage, bestial sexual predilection acutely insulting to members of the African-American community.

III.

In this case, Jordan contends, inter alia, that IBM and ARC fired him for reporting Farjah's "black monkeys" comment to IBM's managers, and that his firing contravened Title VII of the Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000e to 2000e-17). The district court ruled that his Complaint and Amended Complaint each failed to state a claim of Title VII retaliation. On appeal, the primary issue we face is whether Jordan has alleged facts sufficient to show that, in reporting the "black monkeys" comment to IBM management, he was engaged in a Title VII protected activity.

Jordan maintains that, in reporting the "black monkeys" comment to IBM and ARC, he was reasonably opposing a potential racially hostile work environment. Title VII has been consistently interpreted as prohibiting conduct that is "so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (internal quotation marks and alteration omitted). A hostile work environment is unique among the employment practices that contravene Title VII, in that such an environment normally develops through a series of separate acts, which might not, standing alone, violate Title VII. Indeed, such an environment is usually the sum of several parts. *See Nat'l R.R. Passenger Corp. v.*

Morgan, 536 U.S. 101, 117 (2002). And whether a hostile work environment exists in fact can be a bit of a moving target; there is no "mathematically precise test." *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

An employee who opposes a hostile work environment is engaged in a "protected activity" and cannot be retaliated against. *See* Title VII § 704(a), 42 U.S.C. § 2000e-3(a).[4] The Supreme Court emphasized in June of this year that "Title VII depends for its enforcement upon the cooperation of employees," and that "effective enforcement [of Title VII] could thus only be expected if employees felt free to approach officials with their grievances." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. ___, 126 S. Ct. 2405, 2414, 165 L. Ed. 2d 345 (2006)(internal quotation marks omitted). According to the Court, "[i]nterpreting the antiretaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of [Title VII's] primary objective"—preventing harm—"depends." *Id.*

And we have recognized that a plaintiff pursuing a Title VII retaliation claim need not show that the activity he opposed has, in fact, contravened some aspect of Title VII. Rather, he must simply have a reasonable belief that Title VII has been—or is in the process of being—violated by the activity being opposed. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 406-07 (4th Cir. 2005); *see also Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003) (concluding, in reliance on decisions under Title VII, that "to show 'protected activity,' the plaintiff in a Title VI retaliation case need only prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring"

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[4] In relevant part, Title VII, at 42 U.S.C. § 2000e-3(a), prohibits an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter."

(internal quotation marks and alteration omitted)). Accordingly, we are obliged to vacate the district court's ruling if Jordan was engaged in a protected activity when he complained to IBM, i.e., if he reasonably believed that Title VII was being contravened when Farjah made his "black monkeys" comment.

In the majority's view, Jordan is not protected by Title VII, and IBM and ARC were thus free to fire him for reporting Farjah's "black monkeys" comment. The majority's conclusion on this point, however, relies on its misapprehension of Jordan's allegations and its misapplication of the controlling legal principles. As a result, its decision has placed employees like Jordan in an untenable position, requiring them to report racially hostile conduct, but leaving them entirely at the employer's mercy when they do so.

A.

The majority maintains that no reasonable person could believe that Farjah's racially charged conduct would continue, because it was "a single abhorrent slur prompted by—though not excused by—a breaking news report." See ante at 10. On this basis, it concludes that "Jordan rests his case on the assumption that Farjah would repeat the remarks that he made on October 23 more frequently than his past history indicates." *Id.* at 11. The majority's position, however, cannot be reconciled with the allegations of the Amended Complaint.

Our inquiry must focus on Jordan, and whether it was reasonable for him to believe that Title VII was in the process of being violated when Farjah's "black monkeys" comment was made. *See Navy Fed.*, 424 F.3d at 406-07; *Peters*, 327 F.3d at 320. Even if the "black monkeys" comment was prompted by a news report and not specifically aimed at Jordan or anyone else in the room, a reasonable person could readily conclude that, if not confronted, Farjah's conduct would continue unabated, altering the working conditions of

IBM's African-American employees. Indeed, Farjah apparently offered no apology or explanation (such as that supplied today by the majority) to manifest any remorse or regret for having made his "black monkeys" comment. Responding to such blatant and unabashed racism in his workplace, Jordan "immediately reported [Farjah's] remark to several coworkers," and at least two of them advised Jordan "that they had heard Farjah make *similar offensive comments many times before*." Amend. Compl. P10 (emphasis added). That information confirmed Jordan's initial concerns, thereby providing substantial (and ample) support for his reasonable conclusion that African-American workers at IBM's facility were regularly exposed to conduct akin to the "black monkeys" comment, and that such conduct would continue unless Farjah was confronted.

In the majority's view, the information provided by Jordan's coworkers, coupled with the "black monkeys" comment, did not allow Jordan to reasonably believe that Farjah's conduct would be repeated. As the majority sees it, a reasonable person could not make heads or tails out of what his co-workers meant because (1) Jordan had not experienced the other comments personally, and (2) he "did not know about where or when such statements were made, or what Farjah said except that the statements were similar." *Ante* at 11. Taking the coworkers' reports at face value, however, nothing was vague—Farjah had openly referred to African-Americans as "black monkeys," and he had made "similar offensive comments many times before." Amend. Compl. PP9-10. That the specific content, dates, and conditions of Farjah's earlier offensive remarks may not have been communicated to Jordan is beside the point. The reasonable employee—like Jordan, an African-American—would have no need to question his coworkers to determine that Farjah had previously voiced racially hostile comments, and that he was likely to continue doing so. *Cf. Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269 (4th Cir. 2001) (rec-

ognizing that victim of harassment is commanded to "report the misconduct, not investigate, gather evidence, and then approach company officials"). Accepting Jordan's allegations as true, he possessed an objectively valid basis for believing that Farjah had made comments of "similar offens[e]" to his "black monkeys" comment "many times before." *See* Amend. Compl. P10. Jordan was thus entitled to conclude that what he had witnessed and heard in the television room was simply "par for the course."

Moreover, Farjah's "black monkeys" comment opened a window into his soul, revealing to Jordan a racial animus as ignorant as it was virulent. It is, in my view, entirely reasonable to believe that a person who—even in a moment of extreme frustration—equates African-Americans with "black monkeys" and "black apes," and implies that they have a bestial sexual appetite, possesses a deep disdain for the entire black community and would likely repeat his offending conduct.

B.

Next, as a matter of law, I do not subscribe to the majority's view that, pursuant to *Navy Federal*, an employee lacks Title VII protection for reporting racially charged conduct, unless he has "an objectively reasonable belief that a violation is actually occurring." *See ante* at 10. On this point, the majority implies that the employee cannot meet that burden without allegations that "a plan was in motion to create [a hostile work] environment." *Id.* This position is simply incorrect, for at least two reasons. First, requiring an employee to show that a hostile work environment was being planned imagines a fanciful world where bigots announce their intentions to repeatedly belittle racial minorities at the outset, and it ignores the possibility that a hostile work environment could evolve without some specific intention to alter the working conditions of African-Americans through racial harassment. Second, and relatedly, it fails to take into

account the cumulative nature of a hostile work environment, and is thus at odds with the broad application of Title VII's anti-retaliation provision prescribed by the Supreme Court.

As the majority observes, the Supreme Court has treated hostile work environment claims in a way that accounts for their unique, additive character. In *Morgan*, the Court observed that "[a] hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *See* 536 U.S. at 117. It instructed that Title VII "does not separate individual acts that are part of the hostile environment claim from the whole." *Id.* at 118. And the Court has recognized that an employer is entitled to assert—in order to avoid vicarious liability—the affirmative "*Ellerth/Faragher* defense" based in part on an employee's unreasonable failure to head off a hostile work environment's evolution. *See Faragher*, 524 U.S. at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

The *Ellerth/Faragher* defense, in essence, imposes a duty on an employee to report harassing and offensive conduct to his employer. *See Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001) (recognizing employee's "duty . . . to alert the employer to the allegedly hostile environment" (internal quotation marks omitted)). That duty is intended to further Title VII's "primary objective" of avoiding harm, rather than redressing it. *Faragher*, 524 U.S. at 806. The *Ellerth/Faragher* defense thus stands for the proposition that an employee who unreasonably fails to report racially hostile conduct cannot pursue a hostile work environment claim because, by his silence, he was complicit in the conduct. *See id.* at 806-07.

Ignoring the Supreme Court's recent directive that Title VII's antiretaliation provision be broadly construed, *see White*, 126 S. Ct. at 2414, the majority applies that provision narrowly and restrictively, failing to account for the cumu-

lative nature of a hostile work environment. When the cumulative nature of such an environment is properly considered, it is clear that employees are protected under Title VII from employer retaliation if they oppose conduct that, if repeated, could amount to a hostile work environment. *See Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 190, 195-96 (7th Cir. 1996) (concluding that employee had reasonable, good-faith belief that Title VII violation was in progress when co-worker, on single occasion, said "if a nigger can do it, anybody can do it," and apologized shortly thereafter).

By opposing racially charged conduct that he reasonably believes could be part and parcel of a hostile work environment, a reporting employee has opposed the impermissible whole, even absent an independent basis for believing the conduct might be repeated. *See Faragher*, 524 U.S. at 806-07; *see also Morgan*, 536 U.S. at 117. Indeed, in applying the *Ellerth/Faragher* defense, we require employees to report such incidents in order to prevent hostile work environments from coming into being. *See Matvia*, 259 F.3d at 269 ("*Faragher* and *Ellerth* command that a victim of . . . harassment report the misconduct, not investigate, gather evidence, and then approach company officials."); *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998) ("[A]ny evidence that [the employee] failed to utilize [the company's] complaint procedure will normally suffice to satisfy its burden under the second element of the [*Ellerth/Faragher*] defense." (internal quotation marks and alteration omitted)). Only a tortured reading of Title VII can validate the proposition that an employee who has taken a step necessary to avoid complicity in a Title VII violation has not "opposed any practice made an unlawful employment practice." § 2000e-3(a). Indeed, in *Barrett*, we recognized that an employee's "generalized fear of retaliation does not excuse a failure to report" harassing conduct, because "Title VII expressly pro-

hibits any retaliation against [employees] for reporting . . . harassment." *See* 240 F.3d at 267.

Without question, Farjah's "black monkeys" comment is the stuff of which a racially hostile work environment is made. *See White v. BFI Waste Servs., LLC*, 375 F.3d 288, 297-98 (4th Cir. 2004) (recognizing pervasive use of terms including "boy," "jigaboo," "nigger," "porch monkey," "Mighty Joe Young," and "Zulu warrior" created triable issue of fact on hostile work environment claim); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182, 185-86 (4th Cir. 2001) (same for repeated use of racial slurs, including "niggers," "monkeys," and "black bitch"). On the allegations here, it was entirely reasonable for Jordan to believe that, in reporting the racially charged "black monkeys" comment to his employers, he was opposing a racially hostile work environment. IBM and ARC nonetheless fired him—for simply reporting this outrageous comment to them—and they thereby contravened his Title VII rights.[5]

C.

As a result of today's decision, employees in this Circuit who experience racially harassing conduct are faced with a "Catch-22." They may report such conduct to their employer at their peril (as Jordan did), or they may remain quiet and work in a racially hostile and degrading work environment, with no legal recourse beyond resignation. Of course, the essential purpose of Title VII is to avoid such situations.

The majority maintains that "Jordan's dilemma, that the law is inconsistent by both encouraging and discouraging 'early'

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[5] Jordan has never requested that we, as the majority puts it, transform Title VII into a "statutory civility code." *See ante* at 14. Indeed, he has never even contended that Title VII required IBM to discipline Farjah for making the "black monkeys" comment. Jordan asserts only that IBM cannot, consistent with Title VII, fire him for reporting the "black monkeys" comment.

reporting, is presented too abstractly." *Ante* at 12. In my view, however, one need not venture into abstractions; as our Title VII jurisprudence now stands, Farjah's comment thrust Jordan into the narrows between Scylla and Charybdis.[6] By our *Matvia* decision, we actually "command[ed]" Jordan to report the "black monkeys" comment, "not investigate, gather evidence, and then approach company officials." *See* 259 F.3d at 269. And we explained that a fear of retaliation by IBM would not excuse his reporting duty, because such retaliation is expressly prohibited by Title VII. *See id.* at 270 ("The bringing of a retaliation claim, rather than failing to report . . . harassment, is the proper method for dealing with retaliatory acts." (citation omitted)). Jordan thus acted at our command and with our offer of protection, but he has nevertheless been denied our promised lifeline, and has been left entirely vulnerable.

If Jordan, when he experienced the "black monkeys" comment, could have foreseen the course of events that would unfold, he would have recognized that—aside from immediately filing an EEOC complaint—he had but two choices. He could remain silent, in direct defiance of this Court's commandment to report racially charged conduct as soon as it occurs (thereby allowing Farjah's pattern of conduct to continue unchallenged, and forfeiting any judicial remedy he might have); or he could risk his career in an effort to attack the racist cancer in his workplace. Jordan thus speaks from experience when he contends that our Title VII jurisprudence is inconsistent by both encouraging and discouraging early reporting. The majority asserts that there is

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[6] In Homer's *Odyssey*, Odysseus is presented with a difficult choice: he must sail through straits that are bracketed by two monsters, and he is forced to navigate closer to one or the other. One choice, Scylla, is a six-headed creature who is certain to eat six of his crewman, while the other, Charybdis, spews forth a whirlpool that poses an uncertain risk to the entire ship and crew. On the advice of the sorceress Circe, Odysseus chose Scylla, and six of his men perished.

no conflict between the *Ellerth/Faragher* duty to report harassing conduct and the requirement that employees complaining of harassing conduct have a reasonable belief that Title VII is being violated by the challenged conduct. According to the majority, the two doctrines work in harmony: "Complaining employees are protected by Title VII once they have an objectively reasonable belief that a Title VII violation has occurred, and they have a reasonable amount of time in which to bring their concerns to their employers' attention." *Ante* at 13-14.[7] The foregoing proposition, however, is only valid if, as I have contended, employees are always protected by Title VII's anti-retaliation provision whenever they are obliged to report improper conduct under the *Ellerth/Faragher* defense, as otherwise some employees will be commanded to report such conduct at their peril.

Yet, if Title VII protects all employees who comply with the *Ellerth/Faragher* defense's reporting duty, the majority's decision is wrong. Although the "black monkeys" comment plainly required reporting under our controlling precedent, the majority rules today that Jordan was not protected by Title VII's anti-retaliation provision when he reported it. Farjah's "black monkeys" comment thus placed Jordan into the same legal vacuum that the majority asserts not to exist. And the employees in this Circuit, who are now compelled to choose between their livelihoods and their dignity, can surely take little comfort in the majority's insistence that their dilemma "is presented too abstractly." In the wake of the majority's decision, there is simply no room for the employee cooper-

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[7] Although I do not subscribe to the majority's characterization of the *Ellerth/Faragher* reporting requirement as a "laches concept" that merely prohibits inordinate time delays between discriminatory or harassing conduct and reporting, *see ante* at 13, I accept it *arguendo* as it nonetheless fails to support the majority's conclusion.

ation the Supreme Court has just explained as being critical to Title VII's effectiveness. *See White*, 126 S. Ct. at 2414.

The members of the majority further assert that the interplay between the *Ellerth/Faragher* defense, on the one hand, and the reasonable belief requirement embodied in our Title VII anti-retaliation jurisprudence, on the other, "is of limited applicability." *Ante* at 13. This is so, they say, because the former concerns only an employee's ability to bring suit, while the latter involves whether the employee can safely complain of harassing conduct. *See id.* And they offer their assurance that an employee who "loses his right to a judicial remedy under Matvia still has the incentive to report" racial harassment. *Id.*

In authorizing private actions under Title VII, however, Congress exercised its considered judgment that such suits are an essential tool for ensuring compliance with Title VII's provisions. And, as the Supreme Court has observed, the Title VII "anti-retaliation provision's primary purpose" is "maintaining unfettered access to statutory remedial mechanisms." *White*, 126 S. Ct. at 2412 (internal quotation marks and alteration omitted). With all respect to my fine colleagues of the majority, it is not for unelected judges to decide that Congress's chosen remedy is unimportant, and that it may be effectively eviscerated by some judicially created "reasonable belief" requirement.

Title VII protects an employee (such as Jordan) who reports harassing conduct under the reasonable belief that he is obliged to do so. And I disagree wholeheartedly with the majority's contrary view.[8]

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[8] Because Jordan's other retaliation claims, alleged under 42 U.S.C. § 1981 and Montgomery County (Maryland) Code section 27-19, rely on the same legal principles as his Title VII retaliation claim, I also disagree with the majority's ruling that those claims were properly dismissed.

IV.

Finally, Jordan has adequately pleaded a claim of a racially discriminatory firing, in contravention of 42 U.S.C. § 1981. In concluding to the contrary, the majority has brought our jurisprudence into direct conflict with the Supreme Court's unanimous decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). In *Swierkiewicz*, the Court relied on the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)* in concluding that an employment discrimination plaintiff's bare allegation that an adverse employment action had been taken "on account of" a prohibited ground sufficiently alleges that the action was so motivated. *See* 534 U.S. at 514. Yet, the majority today rules that Jordan's materially indistinguishable allegation (that he was fired "because he is African-American" and that his "race was a motivating factor," Amend. Compl. P42) is insufficient to comply with Rule 8(a)'s notice pleading requirements.

In *Swierkiewicz*, the Court unanimously reversed a decision of the Second Circuit, which required a plaintiff-employee to plead the specific facts necessary to establish a prima facie case of employment discrimination under the *McDonnell Douglas* framework. See 534 U.S. at 515. In so ruling, the Court reiterated that, in order to survive a Rule 12(b)(6) motion to dismiss in a civil action governed by Rule 8(a) (such as an employment discrimination action), a plaintiff need only "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Id.* at 512 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).[9] And, as the Court observed, the

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[9] The majority asserts that the district court dismissed Jordan's § 1981 discrimination claim not because of a "failure to give notice of his claim," but because "what was alleged failed to state a discrimination claim." *Ante* at 18. By this, the majority is apparently drawing a distinction between a complaint that fails to give notice, in that it does not adequately disclose the nature of the plaintiff's claim, and a complaint that fails to state a

"simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* The Court thus concluded that Swierkiewicz had stated valid claims of national origin and age discrimination, where his complaint "alleged that he had been terminated on account of his national origin . . . and on account of his age," and further "detailed the events leading to his termination." *Id.* at 514.

Jordan has amply detailed the events leading to his improper termination (including the "black monkeys" comment, his consultation with co-workers, his report to unsympathetic supervisors, and the abrupt deterioration of his working conditions). And he has specifically alleged that he was fired for reporting Farjah's "black monkeys" comment "because he is African-American," and that his "race was a motivating factor" in his discharge. Amend. Compl. P42.[10] As such, he has plainly satisfied Rule 8(a)'s notice pleading requirement, and he has stated a claim upon which relief can be granted.

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claim, in that its alleged facts provide no legal basis for recovery. Jordan's allegations (that he is African-American, that he was fired, and that the former contributed to the latter), if true, plainly provide a basis for recovery under § 1981, and I do not read the majority opinion as holding that an employee may not recover under § 1981 if he has been fired on account of his race. Thus, the majority's conclusion can mean only that Jordan's allegation—that "race was a motivating factor" in his discharge—was insufficient to give IBM notice of his discrimination claim.

[10] In its ruling, the majority simply misapprehends the nature of Jordan's discriminatory firing claim, asserting that "Jordan has not demonstrated how Farjah's racism could be imputed to the defendants." *Ante* at 17. By his discrimination claim, Jordan essentially alleges that, in reaching its decision to retaliate against him for reporting the "black monkeys" comment, IBM concluded that, although a similarly situated white employee might be allowed to remain on staff, it could not tolerate a "rabble-rousing" African-American.

In affirming the district court's dismissal of Jordan's § 1981 racial discrimination claim, the majority today announces that, in order to comply with Rule 8(a), Jordan must detail—in his complaint—all of the specific facts from which a reasonable jury could conclude that race entered into IBM's decision to fire him. Such a requirement simply cannot be reconciled, however, with the "fair notice" standard reiterated by the Court in *Swierkiewicz*, as it collapses into Rule 9(b)'s more rigorous requirement that causes of action for fraud or mistake be pleaded with particularity. *See Swierkiewicz* 534 U.S. at 513 (observing, in rejecting Second Circuit's heightened pleading standard, that "[t]his Court . . . has declined to extend [Rule 9(b)'s standard] to other contexts").[11] Indeed, according to the majority, Jordan apparently must satisfy Rule 9(b)'s pleading standard in order to comply with Rule 8(a).[12]

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[11] The majority's opinion fails to account for the distinction we have drawn between a failure "to *forecast evidence* sufficient to prove an element" of the plaintiff's claim, and a failure "to *allege facts* sufficient to *state* elements" of the claim. *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002); *see also Swierkiewicz*, 534 U.S. at 514. This distinction is necessary to preserve the discovery process as a method of "discovering," rather than merely confirming, information. When a plaintiff files his complaint, he cannot be expected to know all of the specific, or even critical, facts underlying a defendant's challenged conduct. *See Swierkiewicz*, 534 U.S. at 512 ("Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case."). Yet, the majority would require the Rule 12(b)(6) dismissal of any employment discrimination claim where the plaintiff does not know, before filing his complaint, those facts necessary to establish that the defendant considered an impermissible factor during its internal decision-making process.

[12] The majority also misconstrues what constitutes an allegation of "fact," asserting that Jordan's allegation that "race was a motivating factor" in IBM's decision to fire him is merely a "legal conclusion," which must be supported by specific factual allegations. *See ante* at 19. On the

Jordan's allegation that he was fired for reporting the "black monkeys" comment "because he is African-American" cannot be distinguished from Swierkiewicz's allegations "that he had been terminated on account of his national origin" and "his age." Even if Jordan has failed to allege the specific facts from which one could independently conclude that IBM was motivated by race when it retaliated against him, he has made the factual allegation that its decision was so motivated, and he has thus given IBM "'fair notice of what [his § 1981 discrimination] claim is and the grounds upon which it rests.'" *Swierkiewicz*, 534 U.S. at 512. In concluding otherwise, the majority today brings us into direct conflict with Supreme Court precedent.[13]

Pursuant to the foregoing, I respectfully dissent.[14]

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contrary, that IBM fired Jordan "because he is African-American" is plainly an allegation of fact.

[13] The majority's reliance on our decision in *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761 (4th Cir. 2003), is misplaced. In *Bass*, we concluded that the plaintiff had not alleged a hostile work environment claim because she alleged neither conduct sufficiently severe or pervasive to create a hostile work environment, nor that any of the "hostile" acts were motivated by a protected ground. *See* 324 F.3d at 765. Jordan, by contrast, has specifically alleged that he was fired (an adverse employment action) because of his race, or in the alternative that "race was a motivating factor." Amend. Compl. P42. In so doing, he provided IBM adequate notice of his racially discriminatory firing claim. *See Swierkiewicz*, 534 U.S. at 514.

[14] I would thus reinstate two counts of Jordan's Amended Complaint: Count One (retaliation for engaging in protected activity, in contravention of Title VII, § 1981, and Montgomery County Code section 27-19); and Count Seven (racially discriminatory firing, in violation of § 1981).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed October 2, 2006]

No. 05-1485
CA-04-1091-8-DKC

ROBERT L. JORDAN,
Plaintiff-Appellant,

v.

ALTERNATIVE RESOURCES CORPORATION; INTERNATIONAL BUSINESS MACHINE CORPORATION,
Defendants-Appellees,

THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; PUBLIC JUSTICE CENTER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amici Support Appellant.

On Petition for Rehearing En Banc

Appellant filed a petition for rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Judges Wilkins, Michael, Traxler, King and Gregory voted to rehear the case en banc, and Judges Widener, Wilkinson, Niemeyer, Shedd and Duncan voted against rehearing en banc. Judges Williams and Motz were disqualified.

The Court denies the petition for rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed October 2, 2006]

No. 05-1485
CA-04-1091-8-DKC

ROBERT L. JORDAN
Plaintiff-Appellant

v.

ALTERNATIVE RESOURCES CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION
Defendants-Appellees

THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; PUBLIC JUSTICE CENTER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Amici Supporting Appellant

On Petition for Rehearing En Banc

Appellant filed a petition for rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Chief Judge Wilkins and Judges Michael, Traxler, King and Gregory voted to rehear the case en banc, and Judges Widener, Wilkinson, Niemeyer, Shedd and Duncan voted against rehearing en banc.

The Court denies the petition for rehearing en banc. Judge King intends to promptly file an opinion dissenting from the denial of rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,
/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed October 13, 2006]

No. 05-1485

ROBERT L. JORDAN,
Plaintiff-Appellant,

v.

ALTERNATIVE RESOURCES CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendants-Appellees.

THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; PUBLIC JUSTICE CENTER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amici Supporting Appellant.

OPINION

On Petition for Rehearing En Banc

By order filed October 2, 2006, the Court denied appellant's petition for rehearing en banc. A poll requested by a member of the Court failed to produce a majority of judges in active service in favor of rehearing en banc. Chief Judge Wilkins and Judges Michael, Traxler, King, and Gregory voted to rehear the case en banc, and Judges Widener, Wilkinson, Niemeyer, Shedd, and Duncan voted against rehearing en banc.

Judge Niemeyer now files an opinion in support of the order denying rehearing en banc, and Judge King files an opinion, in which Chief Judge Wilkins and Judges Michael, Traxler, and Gregory join, dissenting from the denial of rehearing en banc.

NIEMEYER, *Circuit Judge*, opinion in support of the court's order denying appellant's motion for rehearing en banc:

The differences that Judge King has with the majority's view of this case have puffed up the writings of all to such a level that they are addressing abstract arguments about the policy ramifications of Title VII's retaliation provisions. The fact remains that this case presents a straightforward and unremarkable legal question: Did Robert Jordan state a Title VII claim against his employer for retaliation against him for complaining about a coworker's single isolated racist remark made not to Jordan himself, but to a television set? While the single racist remark by the fellow employee was an ugly one, not even Jordan alleged that it had created a hostile work environment as defined by Title VII cases. Ruling comfortably within the bounds of the statutory language and existing precedent, the district court dismissed the claim under *Federal Rule of Civil Procedure 12(b)(6)*, and we affirmed.

The complaint alleges that Jordan, while in the network room of his employer's office, heard Jay Farjah, a coworker, who was watching television, exclaim—not directly to Jordan but in his presence—"They should put those two black monkeys in a cage with a bunch of black apes and let the apes f--k them." Farjah was speaking to the television set in response to a report that John Allen Muhammad and Lee Boyd Malvo, the Washington-area terrorists, had been captured. Jordan alleged that he was offended by Farjah's statement and reported it to two other coworkers, who told Jordan that they had heard Farjah make similar offensive remarks many times before. Jordan complained about Farjah's remark to various supervisors, who briefly investigated it.

Jordan's complaint alleges that during the month following his complaints about Farjah's remark, one supervisor delayed his work shift by two and a half hours and gave him extra work assignments, and another made a derogatory remark

toward him at an office Thanksgiving party. He alleged that about a month after he complained, his employer fired him because, as his employer said, he was "disruptive," his position "had come to an end," and, as he was told, his fellow employees and supervisors "don't like you and you don't like them." He alleged that this was a "pretext" and that he was fired "because of his opposition to Farjah's racially offensive remark." The district court concluded that Jordan's allegations did not state a claim for retaliation upon which relief could be granted, because Jordan was not opposing "any practice made an unlawful employment practice by" Title VII. *See* 42 U.S.C. § 2000e-3(a).

Jordan admitted that the single isolated racist comment that he heard did not amount to a practice that was made an unlawful employment practice under Title VII, but he did allege that Title VII *might eventually be* violated because "had [a fellow employee] continued, unabated, his conduct would at some time have ripened into [a] racially hostile work environment."

In *EEOC v. Navy Federal Credit Union*, 424 F.3d 397, 406 (4th Cir. 2005), we held that an employee did have a claim for retaliation if he "reasonably believes" that he was opposing a practice made an unlawful employment practice by Title VII, even if the practice had not yet ripened into a Title VII violation. But the law has never protected employees in connection with their complaints about *potential* or *future* violations that they feared might occur. To adopt now such an extension of the statutory language would trample all existing Title VII jurisprudence that recognizes a difference between an isolated racial slur, which is always and everywhere inappropriate, and the sort of severe or pervasive conduct that creates a hostile work environment. "Title VII does not prohibit all verbal or physical harassment in the workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *see also id.* (Title

VII will not become "a general civility code for the American workplace" so long as courts pay "careful attention to the requirements of the statute").

Jordan has argued that the reasonableness standard adopted in *Navy Federal* stands in tension with the early reporting policy incentives discussed in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), and Judge King adopted this argument as his reason for urging an extension of Title VII's retaliation provisions to cover *potential* violations. As we demonstrated in some detail in our panel opinion, however, there is no such tension because Jordan is comparing the qualitative requirement of being objectively reasonable when opposing unlawful practices with the laches concept discussed in *Faragher*. *See Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 341-43 (4th Cir. 2006). Complaining employees are protected by Title VII once they have an *objectively reasonable belief* that a Title VII violation has occurred. On the other hand, if they want to protect their right to sue their employers, they have a reasonable amount of time in which to bring their concern to their employer's attention. These principles are not in tension with each other—they are simply different provisions with different conditions. Congress limited the scope of retaliation claims, and our decision in *Navy Federal* amply protects employees who reasonably err in understanding those limits. We have simply indicated our unwillingness to go beyond *Navy Federal* and use Title VII to create a national workplace civility code.

As the law stands, Title VII does not create a claim for every employee who complains about the potential for Title VII violations or about other employees' isolated racial slurs. It protects an employee who opposes "any practice made an unlawful employment practice," 42 U.S.C. § 2000e-3(a), or

who "reasonably believes" he is opposing a practice made an unlawful practice by Title VII, *Navy Federal*, 424 F.3d at 406.

Of course nothing in our ruling condones the contemptible comment made by the coworker in this case. We have simply held that complaining about an isolated racial slur is not opposition protected by Title VII.

On the § 1981 discrimination claim, the issue is not whether Jordan's complaint is too spare to satisfy notice pleading, as Judge King frames the issue. Neither we nor the district court held it to be too spare. The issue is whether Jordan's pleading states a claim upon which relief can be granted. Jordan's detailed complaint for § 1981 discrimination is that his employer fired him because of "his opposition to [a fellow employee's] racially offensive statement." The district court said that this did not state a § 1981 claim for discrimination, even if Jordan alleged in a conclusory manner that it amounted to discrimination, because Jordan failed to demonstrate any basis from which to conclude that his *own race* "played any role in his termination." The court observed that the only person alleged to have engaged in racist conduct was the fellow employee, and the fellow employee was "not alleged to have contributed to Jordan's termination." We have affirmed the district court on this same reasoning.

For these reasons, this case merits no analysis further than the careful and thorough analysis already applied by both the majority and dissenting opinions.

KING, *Circuit Judge*, dissenting from denial of rehearing en banc:

I write to briefly memorialize my profound disappointment with our Court's decision to deny Jordan's petition for rehearing en banc—by a tie vote of five to five.[1] Although Jordan's petition has been denied, his contentions in this appeal have substantial merit, and they warrant serious consideration by the Supreme Court. As explained herein and in more detail in my earlier dissenting opinion, *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 349-59 (4th Cir. 2006) (King, J., dissenting), I disagree with my friends in the panel majority on two issues of exceptional importance.

First, the panel majority's denial of Jordan's Title VII retaliation claim is contrary to Supreme Court precedent established by *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), and *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). The Court, in *Ellerth* and *Faragher*, commanded that an employee who has experienced racially charged conduct must report such conduct as soon as it is practicable to do so under his employer's complaint procedure. *See Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 266-67, 269 (4th Cir. 2001) (citing *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807). By its opinion, the panel majority has concluded that, when an employee complies with *Ellerth* and *Faragher* in promptly reporting racially charged conduct, he is stripped of his

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[1] Pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure, a majority of the qualified active judges must vote in the affirmative in order for rehearing en banc to be granted. Our 5-5 vote has failed that test, and I have no quarrel with the Rule itself. However, I strongly believe that rehearing en banc should have been granted because (1) it was "necessary to . . . maintain uniformity of this court's decisions" and (2) Jordan's appeal involved questions "of exceptional importance." Fed. R. App. P. 35(a).

protection from retaliation under Title VII.[2] Such a construction of Title VII, which penalizes an employee for complying with the controlling mandate of *Ellerth* and *Faragher*, is inconsistent with the Court's view of Title VII. In its recent *White* decision, the Court instructed that we must construe Title VII's anti-retaliation provision broadly, so as to further "the . . . provision's primary purpose" of "maintaining unfettered access to statutory remedial mechanisms." *White*, 126 S. Ct. at 2414 (2006). Nevertheless, the panel majority, without addressing *White's* holding, has construed Title VII's anti-retaliation provision so narrowly that most employees who seek its protection will have their access to statutory remedial mechanisms either fettered or barred altogether. Our Court has thereby created an untenable Catch-22 situation for such employees.

Second, the panel majority's Rule 12(b)(6) ruling on Jordan's § 1981 claim contravenes controlling Supreme Court precedent in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). The Court there concluded that Swierkiewicz's bare allegation that an adverse employment action was taken "on account of" a prohibited ground was sufficient, under Rule 12(b)(6), to state a claim upon which relief can be granted. *See* 534 U.S. at 514. In so ruling, the Court expressly rejected the contention that Swierkiewicz's complaint did not state a valid claim because it was

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[2] The circumstances of Jordan's report of racially charged conduct to his employers bear noting. In October 2002, Jordan and a white coworker were watching a televised report on the capture of snipers who had terrorized the Washington, D.C. area that fall. As they watched, the coworker loudly stated his position that "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them." Amend. Compl. P9. After learning from certain colleagues that this coworker had made similar offensive comments many times before, Jordan advised several of his managers of the "black monkeys" comment, in accordance with his employers' anti-discrimination policies. Jordan was terminated shortly thereafter, for having reported the foregoing.

"based on conclusory allegations of discrimination." *Id.* The panel majority has nevertheless ruled that Jordan's allegation (that he was fired "because he is African-American" and that his "race was a motivating factor," Amend. Compl. P42) fails to state a claim upon which relief can be granted, even though Jordan's allegation is materially indistinguishable from the allegation at issue in *Swierkiewicz*. To make matters worse, the majority based its Rule 12(b)(6) ruling on the very reason rejected by the Court in *Swierkiewicz*: that Jordan's complaint "rested on his illogical conclusory statement that his race was a 'motivating factor' for his firing." *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 345 (4th Cir. 2006). This result simply cannot be reconciled with the Court's decision in *Swierkiewicz*.

In sum, the decision of the panel majority has disregarded important Supreme Court precedent in its disposition of Jordan's Title VII retaliation claim and his § 1981 claim.[3] These rulings present issues of exceptional importance to the workers and employers of this Circuit and this country, not only because of the discord the majority has sown in our Title VII and § 1981 jurisprudence, but also because of the judicial

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[3] In addition to disregarding precedent, the panel majority has ignored critical allegations in Jordan's complaint, in contravention of Rule 12(b)(6) principles. This flaw in the majority's decision is underscored by the opinion in support of denial of rehearing en banc, which contains errors on the factual predicate of this appeal, including the following.

> Although the opinion acknowledges that Jordan's co-worker made similar offensive remarks before spewing out the "black monkeys" comment, it refers multiple times to the "black monkeys" comment as a single, isolated racial slur.
>
> On his § 1981 claim, Jordan does not simply allege that "his employer fired him because of 'his opposition to [a fellow employee's] racially offensive statement.'" *Ante* at 4. Significantly, Jordan asserts that he was fired "because he is African-American," and that his "race was a motivating factor in the conduct and decisions of" his employers. Amend. Compl. P42.

overreaching that its decision represents. In forcing employees to choose between hostile work environment claims and the protection authorized under Title VII's anti-retaliation provision, the majority has effectively nullified Congress's policy judgment that those safeguards against workplace discrimination should operate concurrently. And, by requiring employees to plead with particularity their claims of employment discrimination, the panel majority has arrogated to our Court the power to overrule, *sub silentio*, the liberal pleading standard of Rule 8(a) in favor of our own notions of effective procedure. *Cf. Swierkiewicz*, 534 U.S. at 515 ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993))).

I must therefore, with all respect, dissent from the denial of Jordan's petition for rehearing en banc, and I urge the Supreme Court to accord serious consideration to any petition for certiorari that Jordan may file.

I am authorized and pleased to state that Chief Judge Wilkins, Judge Michael, Judge Traxler, and Judge Gregory join in this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. DKC 2004-1091

ROBERT L. JORDAN,

v.

ALTERNATIVE RESOURCES CORPORATION, *et al.*

MEMORANDUM OPINION

Presently pending and ready for resolution in this case are (1) the motion of Plaintiff Robert L. Jordan for leave to amend his complaint pursuant to Fed.R.Civ.P. 15(a) (paper no. 23, hereinafter "Am. Compl."), and (2) the motion of Defendant International Business Machines, Inc. ("IBM"), joined by Defendant Alternative Resources Corp. ("ARC"), to dismiss the original complaint for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6) (paper no. 6). The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no further hearing being deemed necessary. For the reasons that follow, the court denies Plaintiff's motion for leave to amend, in part with prejudice and in part without prejudice to renewal, and grants Defendants' motion to dismiss.

I. Background

Given the procedural posture of this case, it is logical and more efficient to examine Plaintiff's proposed amended complaint, rather than the original complaint. Plaintiff, in his proposed amended complaint, alleges the following facts. Plaintiff, an African-American, was jointly employed by

Defendants Alternative Resources Corp. ("ARC") and International Business Machines Corp. ("IBM"). ARC provides information technology management and staffing management services to IBM. Plaintiff worked for ARC at IBM's office as a network technician. IBM exercised control over Plaintiff's day-to-day employment at its office in Gaithersburg, Maryland.

On October 23, 2002, Plaintiff and a co-worker employed by IBM, Jay Farjah, were at their workplace watching a television report about the capture of two African-Americans suspected of multiple sniper-style shootings. Farjah said, in Plaintiff's presence: "They should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them." Offended, Plaintiff related the remark to several co-workers. At least two co-workers told Plaintiff that they had heard Farjah make similar offensive comments many times before.

Believing that Farjah's remark gave rise or would give rise to a hostile work environment, Plaintiff reported the incident to two of his IBM managers, Mary Ellen Gillard (his direct supervisor) and C. J. Huang (another supervisor), and requested that IBM tell Farjah not to make such comments. The managers asked Plaintiff to submit the offensive comment in writing, which he did. Huang expressed skepticism about Plaintiff's complaint, asked whether Plaintiff had considered the impact his incident report might have on Farjah, and suggested that Farjah might have been joking. Plaintiff also reported the incident to an ARC manager, Sheri Mathers.

Later, Gillard told Plaintiff that Farjah denied making the comment as Plaintiff reported it, but admitted saying "they should put those two monkeys in a cage." Plaintiff replied that he wanted to raise his complaint with IBM's site manager, Ron Thompson.

Immediately after the incident and complaints, Plaintiff was directed by Gillard, without explanation, to change his reporting time from 6:30 AM to 9:00 AM, despite previously having been approved for a 6:30 AM start time so that he could finish work early enough to pick up his son after school. Gillard also began assigning more work to him. Later, Huang made a crude, derogatory remark and gesture to Plaintiff at an office party, witnessed by co-workers.

On November 21, 2002, Mathers fired Plaintiff, stating that he was "disruptive," that his position "had come to an end," and that the people at IBM "don't like you and you don't like them."

On February 5, 2004, Plaintiff filed a complaint against Defendants in the Circuit Court for Montgomery County, alleging that Defendants fired him in retaliation for having reported Farjah's offensive remark. The complaint asserted claims of retaliation against both defendants pursuant to § 27-19 of the Montgomery County Code; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*; and 42 U.S.C. § 1981. The complaint also asserted a claim of tortuous interference with contract against IBM.

Defendants removed to this court. IBM then moved to dismiss. Following a hearing before this court on the motion to dismiss, Plaintiff moved for leave to file his amended complaint. The proposed amended complaint asserts one count of statutory retaliation under § 27-19, Title VII, and 42 U.S.C. § 1981 against both Defendants (count I), and a second count of retaliation under § 27-19, pled in the alternative against IBM as "a person" (count II). The amended complaint also asserts "malicious interference with economic relationships and/or tortious interference with contract" (count III) against IBM, and breach of contract (count IV), fraud (count V), wrongful discharge (count VI), and race discrimination in violation of 42 U.S.C. § 1981 (count VII) against both Defendants.

II. Standard of Review

A. Motion for Leave to Amend

Fed.R.Civ.P. 15(a) states that a party may amend a pleading after a responsive pleading has been served "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Undue delay, bad faith, undue prejudice to the opposing party, and futility of amendment are all examples of reasons not to grant such leave. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000) (citing *Foman*).

B. Motion to Dismiss

The purpose of a motion to dismiss pursuant to Fed.R. Civ.P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Accordingly, a 12(b)(6) motion ought not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of Rule 8(a), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

In its determination, the court must consider all well-pled allegations in a complaint as true, *see Albright v. Oliver*, 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999) (citing *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). The court must disregard the contrary allegations of the opposing party. *See A.S. Abell Co. v. Chell*, 412 F.2d 712, 715 (4th Cir. 1969). The court

need not, however, accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979).

"In deciding a Rule 12(b)(6) motion, the court will consider the facts stated in the complaint and the documents attached to the complaint. The court may also consider documents referred to in the complaint and relied upon by plaintiff in bringing the action." *Abadian v. Lee*, 117 F.Supp.2d 481, 485 (D.Md. 2000) (citing *Biospherics, Inc., v. Forbes, Inc.*, 989 F.Supp. 748, 749 (D.Md. 1997), *aff'd*, 151 F.3d 180 (4th Cir. 1998)). When doing so, the court need not convert a Rule 12(b)(6) motion to dismiss to one for summary judgment so long as it does not consider matters "outside the pleading." *See* Fed.R.Civ.P. 12(b) ("If [on a 12(b)(6) motion to dismiss,] matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ."); *Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253, 260-61 (4th Cir. 1998) (citing Rule 12(b)); *Luy v. Balt. Police Dep't*, 326 F.Supp.2d 682, 688 (D.Md. 2004) ("The court may consider a document submitted by the defendant in support of a motion to dismiss, however, '[if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity.') (quoting *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004)).

III. Analysis

Because granting leave to amend is futile only if the amended complaint fails to state any claim upon which relief can be granted, the standard for analyzing the claims in the original and amended complaints is the same. The court

therefore considers the claims in both complaints together. Plaintiff initially contends that both ARC and IBM were his employers and asserts several claims against both Defendants. If, however, IBM was not his employer, Plaintiff asserts other claims in the alternative.

A. Claims against ARC and IBM as employer

1. Statutory Retaliation

In order to state a claim for statutory retaliation under either federal or Maryland law, Plaintiff must allege facts sufficient to show that (1) he engaged in a statutorily protected activity; (2) an adverse employment action occurred; and (3) the adverse action was causally related to the protected activity. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 188 (4th Cir. 2004) (stating standard for § 1981 retaliation claim); *Mackey v. Shalala*, 360 F.3d 463, 469 (4th Cir. 2004) (Title VII); *Magee v. Dansources Tech. Servs.*, 769 A.2d 231, 252-53 (Md.Ct.Spec.App. 2001) (applying Title VII criteria to both federal and state retaliation claims) (citing *Chappell v. S. Md. Hosp.*, 578 A.2d 766, 773 (1990) (stating that because Maryland's anti-retaliation statute closely tracks the language of Title VII, criteria are "likely" the same)). Here, Plaintiff contends that IBM and ARC fired him in retaliation for reporting Farjah's racist remark.

Defendants contend that Plaintiff has failed to allege that he engaged in a statutorily protected activity. The court agrees.

Protected activities fall into two distinct categories: participation and opposition. *See* 42 U.S.C. § 2000e-3(a).[1] "An

[1] 42 U.S.C. §§ 2000e-3(a) states, in pertinent part: "It shall be an unlawful employment practice . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

employer may not retaliate against an employee for participating in an ongoing investigation or proceeding under Title VII, nor may the employer take adverse employment action against an employee for opposing discriminatory practices in the workplace." *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). Plaintiff does not allege that he was participating in an ongoing investigation or proceeding at the time of his termination, so he can only state a Title VII claim for retaliation if he alleges his complaint constituted an act "opposing discriminatory practices in the workplace." *Id.*

"[A] plaintiff bringing a claim under the opposition clause of Title VII . . . must . . . at a minimum have held a reasonable good faith belief at the time he opposed an employment practice that the practice was violative of Title VII." *Adams v. Giant Food, Inc.*, 225 F.Supp.2d 600, 606 (D.Md. 2002) (citing cases). To allege reasonable good faith belief, a plaintiff must allege facts which, taken as true, establish "that his belief was objectively reasonable . . . ." *Id.* (citing *Little v. United Techs.*, 103 F.3d 956, 960 (11th Cir. 1997)). Farjah's comment, which Plaintiff does not even allege was directed at him, simply is not such a violation. Title VII is not a "civility code." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). It is settled law that "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" that "create an abusive working environment," and are therefore not actionable under Title VII. *Faragher v. Boca Raton*, 524 U.S. 775, 786-88 (1998) (applying racial harassment standards in sexual harassment case, and citing, among others, *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not sufficiently alter terms and conditions of employment to create Title VII violation), *cert. denied*, 406 U.S. 957 (1972)) (citations and internal quotation marks omitted). "Properly applied, [the

Title VII standard for judging hostility] will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language . . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment . . . ." *Faragher*, 524 U.S. at 788 (citation and internal quotation marks omitted). Plaintiff alleges that he heard only the single remark by Farjah. Without more, Plaintiff has not, as a matter of law, alleged that his complaint opposed a discriminatory practice in the workplace. Accordingly, the retaliation claims in his original complaint are insufficient, and will be dismissed.

Plaintiff's amended retaliation claim is substantially the same as in his original complaint, except that Plaintiff now also alleges that, after the incident but before he reported it, he was told that the same coworker previously had made other racist remarks. This additional fact, however, still does not make "objectively reasonable" Plaintiff's belief that Defendants engaged in unlawful employment practices by allowing an abusive working environment to persist.

In determining whether harassment constitutes a hostile work environment, courts "must look at all the circumstances to determine whether a work environment is hostile or abusive. These circumstances include: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance." *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). Here, no facts are alleged to indicate that these prior comments, taken alone or in conjunction with the incident involving Plaintiff, constituted a hostile work environment. Plaintiff's amended complaint does not specify the frequency, severity, or nature of the prior comments, nor even any aspect of their content; it

merely states that "two of the co-workers told Jordan that they had heard Farjah make similar offensive comments many times before." Am. Compl. at ¶ 10. Plaintiff does not—indeed, obviously cannot—allege that the prior comments interfered with his work performance. Plaintiff's amended allegations thus fail to state facts sufficient to show an objectively reasonable belief that Farjah's comments constituted a hostile work environment. The amended pleading therefore also fails to state a retaliation claim.

2. Wrongful Discharge

In Maryland, a wrongful discharge cause of action may be sustained when an at-will employee is terminated in contravention of "some clear mandate of public policy." *Adler v. Am. Standard Corp.*, 432 A.2d 464, 473 (Md. 1981). "The complaining party must plead with particularity the source of the public policy" allegedly violated by her termination. *Porterfield v. Mascari II, Inc.*, 823 A.2d 590, 596 (Md. 2003); *King v. Marriott Int'l, Inc.*, 866 A.2d 895, 903 (Md.Ct.Spec.App. 2005) (quoting *Porterfield v. Mascari II, Inc.*, 788 A.2d 242 (Md.Ct.Spec.App. 2002), *aff'd*, 823 A.2d at 609). Plaintiff does not so plead. Defendants note in their opposition that Plaintiff's complaint has not done so, instead asserting only that "the conduct of ARC and IBM violated the public policy of the State of Maryland and constitutes a wrongful discharge under Maryland common law. Maryland public policy prohibits employers from punishing employees who report racially offensive behavior that they believe in good faith violates anti-discrimination laws." Am. Compl. at ¶ 40. In reply, Plaintiff again fails to cite any source for this public policy, asserting only that "it violates the public policy of the United States, Maryland and Montgomery County to fire an individual solely for making a good faith complaint of discrimination." Paper no. 32, at 9. Anti-retaliation laws do not, however, protect every "good faith complaint of discrimination;" as noted *supra* at III.A.1, they are not broad

civility codes, and good faith belief that a violation has occurred is not sufficient if it is unreasonable. Still, Plaintiff seems to believe that, even if he cannot state a retaliation claim, the facts he alleges are near enough to stating such a claim that there must be some public policy against what has been done to him. Maryland wrongful discharge law is more rigorous than that. Plaintiff has given this court and Defendants no source of public policy based upon which "to determine as a matter of law whether the public policy asserted by the plaintiff constitutes a clear, pre-existing mandate" making discharge here wrongful. *Terry v. Legato Sys., Inc.*, 241 F.Supp.2d 566, 570 (D.Md. 2003) (citing *Porterfield*, 788 A.2d at 245). The wrongful discharge claim as pled is therefore insufficient as a matter of law. The court will permit Plaintiff to amend this count to specify the source, if any, of the public policy exception upon which the claim rests.

3. Breach of Contract

Plaintiff alleges that Defendants breached their contracts with him by firing him for reporting the Farjah incident. Plaintiff contends that, because Defendants "have policies that require employees to report to management any conduct that the employees perceive to be discriminatory," Am. Compl. at ¶ 11, and because those policies are "part of the contractual relationship" between Plaintiff and Defendants, *id.* at ¶ 36, his termination constituted a breach of contract.

This claim fails because Plaintiff has failed to allege facts of a contractual provision protecting him from termination at will. Plaintiff contends that "Defendants' policies are part of the contractual relationship that Jordan had with defendants," Am. Compl. at ¶ 36, but as IBM notes, even if that were true, Plaintiff has not alleged that any policy of IBM's, in its handbook or otherwise, limits IBM's discretion to fire him at will. Neither has Plaintiff alleged any such policy of ARC's. An at-will employee "may maintain an action for breach of an

implied employment contract *if existing general personnel policies or procedures limit the employer's discretion to terminate an employee," Gwinn v. Food Lion, L.L.C.*, 195 F.Supp.2d 728, 729-30 (D.Md. 2002) (quoting *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 614 A.2d 1021, 1031 (Md.Ct. Spec.App. 1992)) (italics added), but no such limitation is alleged here. Plaintiff's citation of *Dahl v. Brunswick Corp.*, 356 A.2d 221 (Md. 1976), is inapposite: In *Dahl*, the defendant agreed that its policy on severance pay constituted a unilateral contract. *Id.* at 224. Brunswick's written policy specifically promised severance benefits to Plaintiff, and when that division was sold to another company, that company promised in writing to continue Brunswick's severance policy with respect to those employees. *Id.* Here, no such promise has been alleged.

Furthermore, even if Plaintiff alleged that Defendants' handbooks contained language restricting their rights to terminate him at will, such language would not support a breach of contract claim, because neither IBM's handbook nor ARC's handbook is a contract. In Maryland, an employee handbook that states that it is not a contract cannot be construed as a contract. *Conkwright v. Westinghouse Elec. Corp.*, 739 F.Supp. 1006, 1020-21 (D.Md. 1990) ("Although the validity of implied employment contracts has been recognized, Maryland courts have refused to find employment contracts where . . . an express disclaimer was included.") (citing *Fournier v. United States Fid. & Guar. Co.*, 569 A.2d 1299 (Md. 1990) and *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786 (Md.Ct.Spec.App. 1986), *cert. denied*, 523 A.2d 1013 (1987)). IBM's policy handbook, attached to its response to Plaintiff's motion for leave to amend, specifically states: "This booklet is not a contract." Paper no. 28, Ex. A, attachment, at 2. The preface to ARC's handbook likewise states plainly: "THIS HANDBOOK IS NOT INTENDED TO BE A CONTRACT OR TO CREATE OBLIGATIONS, RATHER IT DESCRIBES THE COMPANY'S GENERAL

PHILOSOPHY CONCERNING PROCEDURES." Paper no. 27, Ex. 1. The policies therein are therefore explicitly, and thus legally, non-contractual.

For both of these reasons, the breach of contract claims are insufficient as a matter of law as to both Defendants.

4. Fraud

Plaintiff alleges that Defendants defrauded him by "both explicitly and implicitly promis[ing]" him that he would not be retaliated against for reporting discriminatory comments. Am. Compl. at ¶ 38. In Maryland, in an action for fraud, a plaintiff must show that (1) the defendant made a false representation to the plaintiff, (2) the defendant either knew of its falsity or was recklessly indifferent as to its truth, (3) the misrepresentation was made *for the purpose of defrauding the plaintiff*, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury resulting from the misrepresentation. *Md. Envtl. Trust v. Gaynor*, 803 A.2d 512, 516 (Md. 2002) (quoting *VF Corp. v. Wrexham Aviation*, 715 A.2d 188, 192-93 (Md. 1998)) (italics added). Here, at worst, Plaintiff alleges that Defendants' policies were misleading, but he alleges no facts to show that the purpose of Defendants' policies was to defraud him. The fraud claim is therefore insufficient as a matter of law.

5. Race Discrimination under 42 U.S.C. § 1981

Plaintiff alleges that "Defendants fired Jordan for reporting a racist remark in the workplace because he is African-American, in violation of 42 U.S.C. § 1981. In the alternative, Jordan's race was a motivating factor in the conduct and decisions of IBM and/or ARC." Am. Compl. at ¶ 42.

To state a § 1981 claim, a plaintiff "must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on

the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.)." *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2nd Cir. 1993) (citing *Baker v. McDonald's Corp.*, 686 F.Supp. 1474, 1481 (S.D.Fla. 1987), *aff'd*, 865 F.2d 1272 (11th Cir. 1988), *cert. denied*, 493 U.S. 812 (1989)). As noted *supra* at II, the bald assertion of a legal conclusion, e.g., that Defendants discriminated against Plaintiff because he is African-American, is insufficient to overcome a motion to dismiss. *See Revene v. Charles County Comm'rs*, 882 F.2d at 873 (unsupported legal allegations); *Papasan v. Allain*, 478 U.S. at 286 (legal conclusions couched as factual allegations).

Here, Plaintiff has alleged that he was fired for reporting a racist remark, but he has alleged no facts suggesting that his own race played any role in his termination. The only person alleged to have engaged in race discrimination is Farjah, and Farjah is not alleged to have contributed to Plaintiff's termination. His § 1981 claim is therefore insufficient as a matter of law. Although no facts alleged thus far have indicated that Defendants discriminated against Plaintiff because of his race, the court will permit Plaintiff to amend this count to allege any such facts.

B. Claims that assert alternatively that IBM was not Plaintiff's employer

1. Alternative Retaliation Claim

In his amended complaint, Plaintiff alternatively alleges that IBM was not his employer, but that IBM nonetheless unlawfully retaliated against Plaintiff under § 27-19 of the Montgomery County Code. This count also fails to state a claim upon which relief can be granted.

The parties disagree as to the initial question of whether § 27-19 can impose liability on a party who is not a plaintiff's

employer. Plaintiff contends that § 27-19 applies to IBM even if IBM was not his employer, because the county statute is broader than Title VII and § 1981 in that it prohibits retaliation by "person[s]," not just employers. *Compare* § 27-19(c) ("A *person* must not: (1) retaliate against any person . . . .") (italics added) *with* § 27-19(a) (prohibiting various forms of discrimination by employers, employment agencies, and labor organizations). IBM counters that § 27-19 itself is titled, and is meant only to address, "Discriminatory Employment Practices." *See id. See also Broadcast Equities v. Montgomery County*, 718 A.2d 648, 653 (Md.Ct.Spec.App. 1998) (stating that section 27 is Montgomery County's "comprehensive statutory scheme aimed at eliminating discrimination in the County in the area[] of . . . employment," and that § 27-19 is specific to "discriminatory employment practices"), *vacated on other grounds*, 758 A.2d 995 (Md. 2000); Stanley Mazaroff, Maryland Employment Law § 7.01, at n.1.1 (2nd ed. 2003) (stating that § 27-19 prohibits employment discrimination). This cannot mean, however, that liability can only be assigned to employers themselves; otherwise, the statute's distinction between employers and persons would be meaningless. It is easy to see how a non-employer's influence over an employer might in some instances give rise to a discriminatory employment practice, and it may well be that such a situation was contemplated by the drafters of § 27-19. However, as Plaintiff's claim fails for other reasons, *see infra*, the court need not resolve this issue definitively.

IBM also asserts that, because Plaintiff raised only the retaliation claim in his original complaint before the Maryland Commission on Human Relations, he has not exhausted his administrative remedies under Md. Code Ann. art. 49B, § 42(b)(2),[2] with respect to the claims he has added in his

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[2] Section 42(b)(2) states, in pertinent part, that an action alleging employment discrimination "may not be commenced sooner than 45 days

amended complaint, including the instant alternative retaliation claim. Plaintiff counters that because the additional counts are plainly related to the original claims, he has complied with the exhaustion requirements. In Title VII cases, courts may exercise jurisdiction "over claims encompassed within the EEOC charge and claims 'like or related to allegations contained in the charge, or which grow out of such allegations.'" *Riley v. Technical & Mgmt. Servs. Corp.*, 872 F.Supp. 1454, 1459 (D.Md. 1995) (citing *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)); *see Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002) ("An administrative charge of discrimination does not strictly limit a Title VII suit which may follow; rather, the scope of the civil action is confined only by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination.") (quoting *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981)). While the court can find no cases holding that the "like or related" doctrine also applies to section 27 claims, the similarities between Title VII and section 27 and existence of the work-sharing relationship between the EEOC and the Maryland Commission on Human Relations ("MCHR"), whereby a claim filed before one commission is effectively filed before both, *see* 29 C.F.R. § 1601.74 (designating MCHR as a Fair Employment Practices ("FEP") agency), lead to the conclusion that Plaintiff may have complied with the applicable exhaustion requirements. *See also Cohen v. Montgomery County Dept. of Health & Human Servs.*, 817 A.2d 915, 925-27 (Md.Ct.Spec.App. 2003) (implying parallels between exhaustion requirements of Title VII and section 27).

Plaintiff's claim nonetheless fails. His amended complaint alleges that "IBM's conduct constituted retaliation in violation of § 27-19(c)(1) of the [Montgomery County] Code."

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after the aggrieved person files a complaint with the county agency responsible for handling violations of the county discrimination laws."

Am. Compl. at ¶ 29. As noted *supra* at III.A.1, the language of section 27-19(c)(1), which bars retaliation for "lawfully opposing any discriminatory practice prohibited under this division" or "filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under this division," is nearly identical to that of Title VII's retaliation provision, 42 U.S.C. § 2000e-3(a). Recognizing that similarity, and consistent with *Magee*, 769 A.2d at 252-53, the court applies the same three-prong test for sufficiency of a retaliation claim. This is true regardless of whether IBM was Plaintiff's employer: Either way, Plaintiff still has failed to allege opposition to a discriminatory practice. *See supra* at III.A.1. Plaintiff has therefore failed to state a claim under § 27-19(c)(1).

Plaintiff also asserts in his amended complaint that "IBM's conduct constituted other unlawful behavior as described in subparagraphs (1), (2), (3) and (4) of § 27-19(c) of the Code." Am. Compl. at ¶ 30. Subparagraphs (2)-(4) state that a person must not:

> (2) Assist in, compel, or coerce any discriminatory practice prohibited under this division;
>
> (3) obstruct or prevent enforcement or compliance with this division; or
>
> (4) attempt directly or indirectly to commit any discriminatory practice prohibited under this division.

Id. Plaintiff does not state what acts by IBM allegedly violate these subparagraphs. As just discussed, Plaintiff cannot state a claim for unlawful retaliation by IBM against Plaintiff. The only other plausibly "discriminatory practice" is Farjah's comment itself, but Plaintiff does not allege that IBM either assisted, compelled, or coerced Farjah into making the comment, § 27-19(c)(2), nor that IBM obstructed enforcement of any anti-discrimination laws, § 27-19(c)(3), or otherwise attempted directly or indirectly to commit that dis-

criminatory practice, § 27-19(c)(4). Thus, Plaintiff has failed to state any claim under § 27-19(c). Count two of Plaintiff's amended complaint is therefore insufficient as a matter of law.

2. Tortious/Malicious Interference

In his original complaint, Plaintiff pled one count labeled "Tortious Interference with Contract" against IBM. In his amended complaint, Plaintiff pleads in the alternative that he was not IBM's employee, that his "employment with ARC was contractual in nature," and that IBM maliciously interfered with his relationship with ARC by inducing ARC to fire him in retaliation for his having reported Farjah's racist remark. Am. Compl. at ¶ 32. Plaintiff therefore alleges that "IBM's conduct constituted malicious interference with Jordan's economic relationship with ARC and/or tortious interference with his contract for employment with ARC." *Id.* at ¶ 34.

The tort pled by Plaintiffs "has two general manifestations." *Macklin v. Robert Logan Assocs.*, 639 A.2d 112, 116-17 (Md. 1994) (citing *Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663, 674 (Md. 1984)). It is committed "when a third party's intentional interference with another in his or her business or occupation induces a breach of an existing contract or, absent an existing contract, maliciously or wrongfully infringes upon an economic relationship." *Macklin*, 639 A.2d at 117 (citing *Sharrow v. State Farm Mutual*, 511 A.2d 492, 497 (Md. 1986)). The *Macklin* court made clear that by "existing contract," it meant only a contract not terminable at will. *See id.* at 119, 120 ("In the absence of an existing contract, it is necessary to prove both a tortious intent and improper or wrongful conduct," but "[w]hen the existing contract is not terminable at will, inducing its breach, even for competitive purposes, is itself improper . . . ."). Here, Plaintiff concedes that he was an at-will employee. Plaintiff attempts to assert, in legal contradiction, that his relationship with

ARC was "contractual in nature," but has alleged no facts to support that legal conclusion. *See Papasan*, 478 U.S. at 286. The tort of tortious interference with contract is thus unavailable to him, and this claim must be analyzed as one for malicious interference with an economic relationship.

To state a claim for malicious interference with economic relations, a plaintiff must allege that there was (1) an intentional and willful act; (2) calculated to cause damage to the plaintiff in his lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) actual damage and loss resulting. *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 650 A.2d 260, 269 (Md. 1994) (quoting *Willner v. Silverman*, 71 A. 962, 964 (Md. 1909)). Here, Plaintiff plainly alleges that he was terminated, an intentional act that resulted in actual damage, satisfying the first and fourth elements. In *Alexander & Alexander*, the Maryland Court of Appeals summarized prior pertinent pronouncements regarding the second and third elements:

> Most recently, we held in *Macklin v. Logan*, [639 A.2d 112, 119 (Md. 1994)], that malicious interference with economic relations requires "both a tortious intent and improper or wrongful conduct." In particular, the Court emphasized that tortious intent alone, defined as an intent "to harm the plaintiff or to benefit the defendant at the expense of the plaintiff" (*ibid.*), was not sufficient to turn deliberate interference into a tort, but that the defendant must interfere through improper or wrongful means.
>
> Therefore, wrongful or malicious interference with economic relations is interference by conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships. Wrongful or unlawful acts include common law torts and "'vio-

> lence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'"
>
> In addition, "actual malice," in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful where the defendant's malice is the primary factor that motivates the interference.

Id. at 271 (citations, internal quotation marks and internal brackets omitted).

Plaintiff does not specify in his amended complaint whether he states a claim for malicious interference on the basis of "improper or wrongful means" or actual malice; he merely contends that in firing him, "IBM was not motivated by any legitimate economic motive" but that "IBM procured Jordan's termination to punish him for reporting a discriminatory comment by an IBM employee, and to deter others from reporting or opposing such conduct." Am. Compl. at ¶ 33.

To the extent that Plaintiff alleges "improper or wrongful means," he must allege a supporting "common law tort[,] violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, [or] the institution or threat of groundless civil suits or criminal prosecutions in bad faith," *Alexander & Alexander*, 650 A.2d at 271. From his reply brief, paper no. 32, it appears that he may wish to assert that his termination was wrongful insofar as Defendants are liable under one or more of the other tort claims in his amended complaint, but the court finds that he has stated no such claim, and in any event Plaintiff does not so plead in his amended complaint. To the extent that he may allege actual malice, he must allege that IBM maintained "ill will, hatred or spite" toward Plaintiff, and that such malice was "the primary factor that motivate[d] the interference." *Alexander*

& Alexander, 650 A.2d at 271. Actual malice "has been characterized as the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." *K & K Mgmt., Inc. v. Lee*, 557 A.2d 965, 984 (Md. 1989) (quoting *H & R Block v. Testerman*, 338 A.2d 48, 52 (1975)). As the court noted in *Alexander & Alexander*, a plaintiff "carrie[s] a heavy burden in trying to establish the interference tort through proof of actual malice. As explained in [*Macklin*,] 639 A.2d at 121-122, under the broader form of the tort, acts of interference with economic relations do not become tortious simply because the defendant carries them out with a wrongful intent." *Id.* That court explained that proof of animosity "would not sustain the tort if [the interferor's] animosity was incidental to its pursuit of legitimate commercial goals." *Id.* Here, Plaintiff has alleged that IBM's conduct was malicious, but has not connected that legal conclusion to any allegations of fact independent of the alleged wrongful intent to retaliate. Accordingly, Plaintiff's amended complaint, as currently stated, is insufficient as a matter of law. The court will permit Plaintiff to amend this count of his complaint to allege facts, if any, showing either wrongful means or actual malice.

IV. Conclusion

For the reasons stated, IBM's motion to dismiss the original complaint will be granted. Because the court finds that the amended complaint as presently constructed fails to state any claim upon which relief can be granted, leave to amend will be denied. *See Foman*, 371 U.S. at 182. It does not appear that Plaintiff can, under any circumstances, allege sufficient facts to state a claim for retaliation, breach of contract, or fraud, so leave to amend will be denied with prejudice as to those claims. With regard to the malicious interference claim against IBM and the wrongful discharge and § 1981 race discrimination claims against ARC and/or IBM, Plaintiff will

be provided a final opportunity to plead, if he can, facts sufficient to state a claim. A separate Order will follow.

/s/ _____
DEBORAH K. CHASANOW
United States District Judge
March 30, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. DKC 2004-1091

ROBERT L. JORDAN

v.

ALTERNATIVE RESOURCES CORPORATION, *et al.*

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 30th day of March, 2005, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion of Defendant to dismiss (paper no. 6), BE, and the same hereby IS, GRANTED and the original complaint BE, and the same hereby IS, DISMISSED;

2. The motion of Plaintiff for leave to file an amended complaint (paper no. 23), BE, and the same hereby IS, DENIED as follows:

a. Leave to amend is DENIED WITHOUT PREJUDICE TO RENEWAL as to counts three (malicious interference), six (wrongful discharge), and seven (race discrimination), provided that any proposed amendment complies with the pleading requirements of those claims as set forth in the accompanying Memorandum Opinion; any such motion must be filed no later than April 18, 2005;

b. Leave to amend is DENIED WITH PREJUDICE as to the remaining claims: counts one (retaliation), two (retaliation), four (breach of contract), and five (fraud); and

3. The Clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties.

/s/

DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. DKC 2004-1091

ROBERT L. JORDON

v.

ALTERNATIVE RESOURCES CORPORATION, *et al.*

MEMORANDUM OPINION AND ORDER

In an opinion filed March 30, 2005, the court ruled that Plaintiff could move for leave to amend certain of the claims and thus granted the motion to dismiss without prejudice. Other claims were dismissed with prejudice. The case was left open in this court and Plaintiff was provided a certain amount of time within which to seek leave to amend, which Plaintiff now declines to do. Plaintiff seeks a ruling now that the dismissal is with prejudice. Such a ruling is inappropriate. While the court concluded that Plaintiff had failed to allege essential elements of the claims, it also left open the possibility that Plaintiff could cure those defects. The fact that counsel disagrees with that conclusion and continues to assert that the claims, as pled, are sufficient, does not change the nature of the dismissal. If Plaintiff ever again attempts to bring those claims, the question would then be ripe as to what effect Plaintiff's failure to seek leave to amend in this action has. Accordingly, Plaintiff's request to change the dismissal to one explicitly with prejudice is DENIED. However, in light of Plaintiff's express disavowal of the opportunity to move for leave to amend, the case can now be closed in this court. The clerk is directed to transmit copies of this Order to counsel for the parties and CLOSE this case.

/s/

DEBORAH K. CHASANOW
United States District Judge

April 26, 2005

Supreme Court, U.S.
FILED
MAR 8 - 2007
OFFICE OF THE CLERK

(2)

No. 06-1086

IN THE

Supreme Court of the United States

ROBERT L. JORDAN,

Petitioner

v.

ALTERNATIVE RESOURCES CORPORATION, et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review petitioner's retaliation claim when the lower courts identified and applied the legal standard for discriminatory retaliation that has been used by this Court, and that has been accepted by every circuit.

2. Whether this Court should review the dismissal of a claim for race-based termination when the complaint alleges a motive other than race for the termination and relies on facts from which a race-based motive may not properly be inferred.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the respondents provide the following corporate disclosures.

Respondent Alternative Resources Corporation ("ARC") is not a publicly traded corporation. More than 10 percent of ARC's stock is owned by its parent company, Pomery IT Solutions, Inc., which is publicly held.

Respondent International Business Machines Corporation ("IBM") is a publicly traded corporation. It has no parent company, and no publicly traded company owns 10 percent or more of IBM's stock.

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BRIEF IN OPPOSITION

Respondents Alternative Resources Corporation ("ARC") and International Business Machines Corporation ("IBM") respectfully request that this Court deny the petition for a writ of certiorari filed by petitioner Robert L. Jordan, seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 14, 2006. As explained below, the Fourth Circuit's judgment was grounded in well-established law, was compelled by applicable statutory language, raises no conflict with decisions of other circuits or this Court, and presents no issue that warrants review by this Court.

STATUTE INVOLVED

This case involves the "opposition clause" of section 704(a) of Title VII of the Civil Rights Act of 1964, which provides in pertinent part:

> (a) . . . . It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [the employee or applicant] has opposed any practice *made an unlawful employment practice* by this [Title] . . . .

42 U.S.C. § 2000e-3(a) (emphasis added).

STATEMENT

This case arises from the dismissal, under Fed. R. Civ. P. 12(b)(6), of a complaint in which Jordan alleged that ARC and IBM retaliated against him in violation of the "opposition clause" of section 704(a) of Title VII of the Civil Rights Act of 1964, and from Jordan's unsuccessful attempt

to amend his complaint to add a claim that he was discharged because of his race. Jordan's claims stemmed from the termination of his employment at an IBM facility in Gaithersburg, Maryland, where Jordan worked as an at-will employee. Jordan alleges that IBM and ARC were his joint employers. *See* Pet. App. at 3a.

According to the complaint, Jordan's termination arose from the following events. On October 23, 2002, Jordan and an IBM nonsupervisory co-worker, Jay Farjah, were both in a room at work, watching a television report of the capture of the D.C. area sniper suspects. In response to the report, Farjah made a crude, racially derogatory, comment about the suspects. The comment was not directed to Jordan, but he overheard it and was offended. Jordan told several co-workers about the incident, and then reported it to IBM and ARC. In response, IBM conducted an investigation and interviewed Farjah, who denied using the words that Jordan reported, although he acknowledged making an inappropriate statement. After making his report, the complaint alleges, Jordan began to experience difficulties at work and was terminated about one month later. *See* Pet. App. at 4a. Jordan alleges that his termination was causally connected to his report of Farjah's remark.

IBM moved to dismiss Jordan's complaint, asserting that, on the facts alleged, Jordan's report was not protected by section 704(a) because he could not have held an objectively reasonable belief that, by reporting the Farjah statement, he was opposing an unlawful employment practice--the legal standard used in the Fourth Circuit and, as discussed below, in every other circuit and by this Court. ARC joined in the motion.

Following a hearing, Jordan sought leave to amend his complaint to add, among other things, a race

discrimination count under 42 U.S.C. § 1981 in which he incorporated his allegations regarding retaliation and asserted that "race was a motivating factor" in his termination. *See* Pet. App. at 17a. On March 30, 2005, the district court dismissed Jordan's complaint, with prejudice as to the retaliation claim, concluding that Jordan's report was not protected by section 704(a) because he could not establish that he had an objectively reasonable belief that an unlawful employment practice had occurred. *See* Pet. App. 63a-66a. The district judge denied Jordan's motion to amend his complaint to add the race discrimination claim, as framed in his proposed amended complaint, but invited him to amend again to assert facts supporting his allegation that his race played a role in his discharge. *See* Pet. App. at 70a, 82a (Opinion), 79a (Order). Jordan declined to amend, electing to stand on his allegations in the proposed amended complaint. The district judge directed the clerk to close the case, and an appeal to the Fourth Circuit ensued.

On May 12, 2006, a divided panel of the Fourth Circuit entered an opinion and order affirming the district court, agreeing that Jordan was not entitled to protection under section 704(a) because he could not have reasonably believed that, by reporting a single racist remark by a nonsupervisory employee, about a matter that had occurred outside of the workplace, he was opposing illegal conduct. The panel also concluded that Jordan's section 1981 claim was insufficiently pleaded under Supreme Court and Fourth Circuit precedent. Judge Niemeyer wrote the opinion for the panel majority, in which Judge Widener joined; Judge King dissented. *See Jordan v. Alternative Res. Corp.*, 447 F.3d 324 (4th Cir. 2006).

Jordan petitioned for rehearing, and on July 5, 2006, the petition was granted and the May 12 opinion and order were vacated. *See Jordan v. Alternative Res. Corp.*, 2006

App. LEXIS 16794 (4th Cir. July 5, 2006). On August 14, 2006, the panel issued a new opinion that, again, affirmed the district court. Judge Niemeyer again wrote the opinion for the majority, and Judge King again dissented. The August 14 opinion again concluded that Jordan could not have reasonably believed that his report of Farjah's comment was protected. In explaining the majority's position, Judge Niemeyer discussed the "reasonable belief" standard, citing Fourth Circuit precedent, *see* Pet. App. at 7a-8a, and noted that the only conceivable unlawful conduct raised by the allegations in the complaint was a possible "hostile work environment," *see* Pet. App. at 9a. He pointed out that an actionable hostile work environment required conduct so severe and pervasive as to change the terms and conditions of the victim's employment, citing this Court's opinions in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *See* Pet. App. at 8a. Based on that authority, he concluded that the co-worker's isolated outburst, not aimed at Jordan and not about anything related to the workplace, could not have created a hostile work environment, and that Jordan's alleged belief to the contrary was unreasonable, as a matter of law. *See* Pet. App. at 9a-16a. In dissent, Judge King argued that Jordan's belief that a hostile work environment existed was not unreasonable, *see* Pet. App. at 33a-35a. In addition, Judge King argued, the "reasonable belief" standard was inapplicable in light of this Court's opinions in *Ellerth* and *Faragher*, apparently believing that the encouragement in those cases for early reporting of harassing conduct somehow eviscerated the statutory requirement that the conduct complained of be unlawful. *See* Pet. App. at 35a-38a.

Jordan petitioned for rehearing *en banc*. The petition was denied, on a five-to-five vote, *see* Pet. App. at 49a, and Judges Niemeyer and King again issued opinions supporting

their respective positions, *see* Pet. App. at 49a-57a. On the section 704(a) issue, Judge Niemeyer addressed what Jordan, and Judge King, perceived as a conflict between the reasonable belief standard and the *Ellerth* line of cases, observing that the two can and do work in harmony and, together, provide ample protection for those who report harassing conduct. *See* Pet. App. 52a-53a. Jordan filed his petition for writ of certiorari on February 1, 2007.

REASONS FOR DENYING PETITION

The Fourth Circuit held that Jordan was not entitled to protection under section 704(a) because he was not opposing activity that was itself a violation of Title VII (that is, a hostile work environment) and, more importantly, that Jordan could not have had a "reasonable belief" that the activity he was opposing was illegal. *See* Pet. App. at 11a-12a. A reader of Jordan's petition might conclude that the Fourth Circuit created the "reasonable belief" standard out of whole cloth, and that the standard has no place in Title VII jurisprudence. *See, e.g.*, Pet. at 7 (as a result of the decision below, "workers *in the Fourth Circuit* face an intolerable conundrum" because of "the *Fourth Circuit's crabbed interpretation* of section 704(a)") (emphasis added). By suggesting that the Fourth Circuit stands alone in its reading of section 704(a), and that its reading is incorrect, the petition seriously mischaracterizes the legal underpinning of the ruling below.

In fact, and as discussed *infra* in part I, the "reasonable belief" standard for determining whether an employee is opposing activity "made an unlawful employment practice" under Title VII, as proscribed by section 704(a), has been a part of the law of discriminatory retaliation for 30 years, has been adopted by every circuit, and was applied by this Court in 2001 to affirm summary

judgment in favor of the employer in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*per curiam*).

Jordan's petition ignores this important history, except for a brief attempt to denigrate *Breeden*, and a fleeting reference to decisions of "some other lower courts." *See* Pet. at 17-19. Rather, Jordan argues that the Fourth Circuit's decision (and, thereby, the entire body of retaliation law) is in conflict with an alleged policy found in four Supreme Court cases, two of which preceded *Breeden*, and only one of which deals with the law of retaliation--albeit a different aspect of that law. The petition argues that the "first" complaints of discrimination, even those made by employees who could not reasonably believe that they were opposing a practice made illegal under Title VII, are entitled to protection because *Burlington Industries, Inc. v . Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), all "encourage" early reporting of harassing conduct, *see* Pet. at 10, 18 and because *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ____, 126 S. Ct. 2405 (2006), calls for a "broad" reading of section 704(a), *see* Pet. at 16. But *Ellerth* and its progeny do not require an immediate report of every workplace impropriety, and the policy underlying those cases is not in conflict with the law of retaliation. As Judge Niemeyer concluded, and as discussed *infra* in part II, the two lines of authority work together, and have operated in harmony for years. There is no issue that requires this Court's review.

The second question presented in Jordan's petition--the sufficiency of the race discrimination claim under section 1981--is a fact-bound dispute that does not warrant review because, among other things, Jordan misconstrues the holding below. The issue there was not whether Jordan's bald allegation of a race-based motive for his termination

was sufficient. Rather, the question was what happens when a complaint alleges facts, purportedly to support an improper motive, that do not support, and indeed tend to refute, that alleged improper motive. As discussed *infra* in part III, dismissal of such a complaint is appropriate. Further, the district court offered Jordan an opportunity to amend and he declined. *See* Pet. App. at 19a. Jordan presents no issue that needs this Court's review.

I. THERE IS NO CONFLICT: THE FOURTH CIRCUIT IDENTIFIED, ARTICULATED, AND APPLIED THE LEGAL STANDARD FOR DISCRIMINATORY RETALIATION EMBRACED BY EVERY CIRCUIT, AND APPLIED BY THIS COURT.

The Fourth Circuit applied the reasonable belief standard and held that Jordan did not meet it--concluding that Jordan could not have reasonably believed that the isolated co-worker's statement, not directed to Jordan, and not related to the workplace, created an unlawful hostile work environment. The petition does not challenge the Fourth Circuit's holding that, on the facts alleged, Jordan did not have a reasonable belief that he was reporting conduct made unlawful by Title VII. Instead, it challenges the validity, or vitality, of the reasonable belief standard. Jordan argues that protection should be afforded to employees "who complain about the first (or early instances) of racial or sexual abuse." *See* Pet. at 8-9. Jordan's proposal is confusing because it does not propose any alternative to the reasonable belief standard, leaving it unclear when protection is to be triggered. But no matter how one interprets Jordan's vague proposal, he would apply it even in situations where the conduct was not illegal (contrary to the plain language of the statute) and where the employee did not have a reasonable belief that illegal conduct had occurred

(contrary to the case law of every circuit, and the law that has been applied by this Court).

Title VII broadly proscribes discrimination in the workplace based on race, and on other protected classifications. Consistent with that proscription, section 704(a) protects employees who "oppose" illegal discrimination from "retaliation" by their employers on account of that "opposition." Congress used clear language to apply the protection only to those who have "opposed any practice *made an unlawful employment practice* by this [Title] . . . ." 42 U.S.C. § 2000e-3(a) (emphasis added).[1] The meaning of "unlawful employment practice" is found in the prior section of Title VII, section 703(a), which makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Thus, before an employee is entitled to protection from retaliation for opposing inappropriate conduct by, or imputed to, the employer, the underlying conduct must constitute illegal discrimination as defined by section 703(a).

Courts that initially applied the "opposition clause" interpreted literally the language of section 704(a), requiring plaintiffs to allege and prove that the conduct they were opposing was, in fact, illegal under section 703(a). *See, e.g., Equal Employment Opportunity Comm'n v. C&D Sportswear Corp.*, 398 F. Supp. 300 (M.D. Ga. 1975), and cases cited therein.

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[1] Section 704(a) also prohibits retaliation against those who make "a charge, testif[y], assist[], or participate[] in" a Title VII proceeding. This prohibition, referred to as the "participation clause," has proof requirements different from those of an "opposition" claim. The parties agree that this is an "opposition clause" case.

In 1977, the district court in Minnesota concluded that this literal reading was inconsistent with the broad remedial purposes of Title VII. *Hearth v. Metro. Transit Comm'n*, 436 F. Supp. 685 (D. Minn. 1977). Expressing concern that the literal reading of the statute created a chilling effect on employees who would otherwise report what they, perhaps wrongly, perceived as illegal discrimination, the court broke with existing authority. It held that "as long as the employee had a reasonable belief that what was being opposed constituted discrimination under Title VII, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII." *Id.* at 688. The next year, the Ninth Circuit adopted the *Hearth* reasoning. *See Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 (9th Cir. 1978).

By 2001, the "reasonable belief" standard had been embraced by every circuit except the Tenth Circuit,[2] which

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[2] *See, e.g., Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (citing *Sias*, "claim concerning the opposition clause requires that the employee have a reasonable belief that the practice the employee is opposing violates Title VII"); *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990) (plaintiff need show only that he acted under a good faith, reasonable belief that a violation existed); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 865 (3d Cir. 1990) (plaintiff must show she had a reasonable belief that her employer was engaged in an unlawful employment practice); *Mayo v. Kiwest Corp.*, 1996 U.S. App. LEXIS 20445, *13-14 (4th Cir. Aug. 15, 1996) (unpublished) (plaintiff "need[s] to have objectively reasonable belief that he was the victim of discrimination made unlawful under Title VII"); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000) (plaintiff must have a "reasonable belief that the employer was engaged in unlawful employment practices"); *Dyer v. Cmty. Mem'l Hosp.*, 2006 U.S. Dist LEXIS 6507, *25-26 (E.D. Mich. Feb. 21, 2006) (unpublished) (belief must have been reasonable, suggesting that there must be some objective evidence to support it, citing *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312-13 (6th Cir. 1989)); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980) (employee is protected from

had held that the employee's subjective belief was sufficient. *See, e.g., Love v. Re/Max of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984) (holding that good faith belief is enough).

In 2001, the issue came before this Court in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*per curiam*) ("*Breeden*"). Ms. Breeden had complained to management because her supervisor and a co-worker (both males) made what she considered to be sexist and offensive comments while the three of them were reviewing applications submitted by prospective employees. She was subsequently fired and brought a retaliation claim under Title VII. The district court entered summary judgment for the employer, but the Ninth Circuit reversed, concluding that Ms. Breeden could have reasonably believed that the comments about which she complained amounted to actionable discrimination. *Breeden v. Clark County School Dist.*, 2000 U.S. App. LEXIS 17564, *3-4 (9th Cir. July 19, 2000).

The Supreme Court reversed and reinstated summary judgment in favor of the employer. Before addressing the merits, the Court commented on the "reasonable belief" standard used by the Ninth Circuit, saying that it expressed

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retaliation for opposing an employment practice that was not yet unlawful but which employee reasonably believed was unlawful, citing *Sias* and *Hearth*); *Evans v. Kansas City Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995) ("a plaintiff must show a good faith reasonable belief that his employer engaged in a discriminatory employment practice"); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994) ("opposition clause protection will be accorded 'whenever the opposition is based on a reasonable belief' that employer has engaged in an unlawful employment practice"); *Little v. United Techns.*, 103 F.3d 956, 960 (11th Cir. 1997) (plaintiff must show a good faith reasonable belief, and "plaintiff's burden under this standard has both a subjective and an objective component"); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981) (citing *Sias*, "[o]pposition based on reasonable belief should be protected from retaliation").

no view on "the propriety of this interpretation of [section 704(a)]." *Breeden*, 532 U.S. at 270. Nonetheless, the Court relied on that standard and determined that Ms. Breeden's belief could not have been reasonable. Citing, and quoting from, both *Burlington Industries, Inc. v . Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), to provide the legal framework for its reasonableness analysis, the Court concluded that, on the *Breeden* facts and the *Ellerth/Faragher* law, "[n]o reasonable person could have believed that the single incident [alleged by the plaintiff] violated Title VII's standard." *Breeden*, 532 U.S. at 271. Thus, although the Court merely assumed, *arguendo,* the applicability of the reasonable belief standard, it squarely held that, where a reasonable person could not believe that the opposed activity was in violation of Title VII, there could be no claim for retaliation under section 704(a). *Id.*

After this Court's decision in *Breeden*, and continuing through today, every case of which the respondents are aware that has addressed the "made . . . unlawful" language of section 704(a) has applied the reasonable belief standard.[3] Indeed, the Tenth Circuit, the only pre-*Breeden* holdout for a subjective standard, changed its rule, after *Breeden*, to a reasonable belief standard:

> [T]he [Supreme] Court [in *Breeden*] implicitly reject[ed] any interpretation of Title VII [that] would permit a plaintiff to maintain a retaliation claim based

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[3] For very recent post-*Breeden* cases, *see, e.g., Moore v. Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006); *Turner v. Baylor Richardson Med. Ctr.*, 2007 U.S. App. LEXIS 1177, *23 (5th Cir. Jan. 19, 2007); *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1118 (8th Cir. 2006); *Freitag v. Ayers*, 468 F.3d 528, 541 (9th Cir. 2006). *See also* cases cited *infra* at note 7.

> on *unreasonable* good-faith belief that the underlying conduct violated Title VII. Accordingly, the Supreme Court's decision in [*Breeden*] supersedes and overrules this court's prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an *unreasonable* good-faith belief that the underlying conduct violated Title VII.

Crumpacker v. Kansas, 338 F.3d 1163, 1171 (10th Cir. 2003) (emphasis in original) (citations omitted).

Pursuant to this clear and unequivocal authority, Judge Niemeyer applied the required standard to the allegations of Jordan's complaint, and held unreasonable Jordan's alleged belief that a hostile work environment was created by the co-worker's isolated, single statement. *See* Pet. App. at 11a-12a. Because Jordan's petition does not challenge that holding, this opposition will not address it, except to make the following observation flowing from Jordan's heavy reliance on Judge King's dissenting opinions.

Jordan's petition quotes Judge King extensively, *see, e.g.*, Pet. at 11, 12, 14-15, and draws much from the fact that four other judges joined in Judge King's dissent regarding the denial of rehearing *en banc*, found at Pet. App. 54a-57a. While those judges, and Judge King, obviously disagreed with the result reached by the panel majority, whether they all would agree that the reasonable belief standard should be

jettisoned, as Jordan argues in his petition, is questionable.[4] Judge King's *en banc* dissent does not mention the reasonable belief standard. Perhaps the dissenters were troubled by the jarring nature of Farjah's alleged comment, and intended to express agreement with the principal thrust of Judge King's first two dissents, in which he concluded that the majority had *misapplied* the reasonable belief standard, and should have found that Jordan's belief was, in fact, reasonable. *See, e.g.*, Pet. App. at 27a, 38a. But that is not the issue presented by the petition here. Indeed, were that the issue, the reasons for denying the writ would be even more obvious, since the misapplication of a correctly stated legal principle is *not* a ground on which this Court generally grants certiorari. *See* Sup. Ct. R. 10.

The dismissal of Jordan's retaliation claims was properly affirmed. And the fact that the Fourth Circuit applied the law of *every* circuit, and the law previously applied by this Court, demonstrates that there is no judicial conflict that warrants this Court's review or involvement.

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[4] All five of the dissenting judges have, within the last two years, authored or joined in opinions expressly applying the reasonable belief standard. *See Equal Employment Opportunity Comm'n v. Navy Federal Credit Union*, 424 F.3d 397 (4th Cir. 2005) (Judges King and Gregory); and *Greene v. A. Duie Pyle, Inc.*, 2006 WL 694377, *2 (4th Cir. Mar. 20, 2006) (*per curiam*) (unpublished) (plaintiff could not have "reasonably believed" that the presence of pornography in the workplace created a hostile work environment) (Judges Wilkins, Michael, and Traxler). In the latter case, the employee raised the issue of a "conflict" between *Ellerth* and the reasonable belief standard. *See* Letter providing supplemental authorities pursuant to FRAP 28(j), *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (Docket Entry dtd. 3/23/06) (letter from respondents' counsel in this case noting that the "conflict" had been raised in the *Greene* briefing). The Fourth Circuit panel in *Greene* apparently saw no such conflict, unanimously affirming summary judgment in favor of the employer in a *per curiam* opinion.

II. THE LAW OF RETALIATION IS NOT IN CONFLICT WITH *ELLERTH*, *FARAGHER*, *SUDERS*, OR *BURLINGTON NORTHERN*.

In his petition, Jordan asks that the Court grant certiorari in order to rewrite section 704(a) to resolve what he contends is an inconsistency between the standard applied by the Fourth Circuit (and every other circuit court, and this Court in *Breeden*), on the one hand, and the Supreme Court's decisions in *Ellerth, Faragher, Suders,* and *Burlington Northern,* on the other. He cites this Court's decisions in those four cases for the proposition that Title VII encourages "early" reporting of harassing behavior, and from that proposition, he argues that section 704(a) protection must extend even to those who do not reasonably believe that unlawful conduct has occurred. *See, e.g.,* Pet. at 9. As is clear from the discussion *supra* in part I, Jordan's argument is not simply that the decision below is in conflict with those four decisions but, rather, that the entire body of retaliation law is in conflict. But that is not so. There is no conflict. The law of discriminatory retaliation, as applied by this Court in *Breeden*, and by all of the circuits, is consistent with those decisions. Although the law does not protect *every* complaint by an employee, as Jordan urges, the "reasonable belief" standard provides protection for early reports of unlawful employment practices, without completely ignoring the language of the statute that protects only those who oppose "unlawful" conduct. Indeed, as discussed *supra* in part I, the reasonable belief standard was itself judicially created to accommodate the same concerns that Jordan cites as a basis for jettisoning that standard.

A. *Ellerth, Faragher,* and *Suders*.

In *Ellerth, Faragher*, and *Suders* this Court established and explicated an affirmative defense available to

employers in harassment cases who can demonstrate that they acted reasonably to prevent or correct harassing behavior, and that the employee unreasonably failed to use the employer's preventative or remedial instruments. In discussing some of the considerations behind those holdings, the Court observed that "[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." *Ellerth*, 524 U.S. at 764. *See also Faragher*, 524 U.S. at 807; *Suders*, 542 U.S. at 146. From this language, Jordan argues that there exists a policy that "encourages harassment victims promptly to alert their employers to any discriminatory behavior," *see* Pet. at 9, so as to provide section 704(a) protection to the "first" (i.e., *every*) report of inappropriate conduct, *see id.* Those cases say no such thing.

Ellerth, Faragher, and *Suders* each addresses the ramifications of harassment by supervisors,[5] the circumstances under which a supervisor's harassing conduct may be imputed to employers, and the defenses that may be available to employers who do not have notice of the supervisor's behavior. But none of them *requires* "early" reporting, let alone the immediate reporting of every perceived act of misconduct by a co-worker. As Judge Niemeyer observed in his panel opinion below:

> As the law stands, employees are not subject to conflicting incentives. Complaining employees are

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[5] The distinction between supervisor harassment, and the inappropriate conduct of a co-worker, which is alleged in this case, is an important one. As this Court observed in *Faragher*, when a supervisor discriminates against subordinates, his actions "necessarily draw upon his superior position" and implicate the employer; but "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go." *Faragher*, 524 U.S. at 803.

> protected by Title VII once they have an objectively reasonable belief that a Title VII violation has occurred, and they have a reasonable amount of time in which to bring their concern to their employer's attention if they want to protect their right to sue their employers [under *Ellerth/Faragher*]. Only at an impermissibly high level of generality, where meaningful distinctions can no longer be observed, can it be argued that the law inconsistently encourages employees to report and at the same time not to report violations, and Jordan's argument, if accepted, would lead to the adoption of a new rule that protects employees who have no reasonable belief that a Title VII violation has occurred, contrary to the statutory limits of the law. When considered in actual application, the objective reasonableness standard *protects* the reporting employee.

Pet. App. at 15a-16a (emphasis in original). Judge Niemeyer elaborated on the point in his opinion explaining why the *en banc* rehearing was denied.

> [T]here is no such tension because Jordan is comparing the qualitative requirement of being objectively reasonable when opposing unlawful practices with the laches concept discussed in *Faragher*. . . . Complaining employees are protected by Title VII once they have an *objectively reasonable belief* that a Title VII violation has occurred. On the other hand, if they want to protect their right to sue their employers, they have a reasonable amount of time in which to bring their concern to their employer's attention. These principles are not in tension with each other--they are simply different provisions with different conditions. Congress limited the scope of retaliation claims, and our

> decision in *Navy Federal* amply protects employees who reasonably err in understanding those limits. We have simply indicated our unwillingness to go beyond *Navy Federal* and use Title VII to create a national workplace civility code.
>
> As the law stands, Title VII does not create a claim for every employee who complains about the potential for Title VII violations or about other employees' isolated racial slurs. It protects an employee who opposes "any practice made an unlawful employment practice," 42 U.S.C. § 2000e-3(a), or who "reasonably believes" he is opposing a practice made an unlawful practice by Title VII, *Navy Federal*, 424 F.3d at 406.

Pet. App. at 52a-53a (emphasis in original).

Moreover, *Ellerth* and *Faragher* do not address the body of retaliation law that by 1998, when those two cases were decided, was well developed with the "reasonable belief" standard. Indeed, *Ellerth* and *Faragher* do not mention retaliation; nor can they be read in a vacuum. When being applied in a retaliation context, those cases must be read in conjunction with *Breeden*, which was decided later, and all of the retaliation cases that came before and after *Breeden*. Those retaliation cases also reflect a "policy," and, more importantly, a legislative imperative, requiring an employee seeking to establish a claim of retaliation to have opposed "unlawful" conduct or, at the least, to have had an objectively reasonable belief that the employer had engaged in a practice that violated Title VII. To expand the protection of section 704(a) any further, let alone to the point requested by Jordan, would eviscerate the statute's plain language and meaning.

If *Ellerth* and *Faragher* had, in fact, created a "policy" under which all employees who complain about nonactionable inappropriate conduct enjoy protection from retaliation, the Supreme Court presumably would have said so in *Breeden* and reached a different result. Faced with this reality, Jordan attempts to denigrate *Breeden* as precedent, arguing that *Breeden* could not possibly have meant what it says because, if it had, it would have "overturned" *Ellerth* and *Faragher*. *See* Pet. at 18. That is an unlikely result, Jordan argues, considering the "careful crafting" of those two decisions, *see id.*, thereby suggesting that *Breeden* was not so crafted, and ignoring the fact that *Breeden expressly* relied on *Ellerth* and *Faragher*. He also argues that, after *Breeden*, this Court restated the "policy" language from *Faragher* in *Suders,* confirming that "this Court did not intend in *Breeden* to overturn . . . *Ellerth* and *Faragher*." *See* Pet. at 18. But there was no need for *Breeden* to "overturn" *Ellerth* and *Faragher,* and *Suders* did not need to clarify *Ellerth* or *Faragher* in light of *Breeden*, because, as discussed above, there is no conflict.

Indeed, in the nine years since *Ellerth*, and the six years since *Breeden*, a time during which many retaliation cases have applied the "reasonable belief" standard in a hostile work environment context, there had been no reported decisions of which the respondents are aware (and Jordan has cited none)--until Judge King's dissent in this case--that even posited the conflict that Jordan sees as so stark and so dangerous as to warrant this Court's review.[6]

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[6] *See, e.g., Diamond v. United States Postal Serv.*, 2002 U.S. App. LEXIS 384, *10-12 (3d Cir. Jan. 4, 2002) (unreported) (co-worker's statement that "now he was going to have to shoot a coon in his barn" could not give rise to reasonable belief that hostile work environment was created); *Fogleman v. Greater Hazelton Health Alliance*, 2004 U.S. App. LEXIS 26861, *4-6 (3d Cir. Dec. 23, 2004) (unreported) (employee could not have had objectively reasonable belief that hostile sexual work environment existed based on her supervisor

The fact that the universally applied reasonable belief standard has worked harmoniously with *Ellerth* and *Faragher* for years compels the conclusion that there is simply no important issue raised by those two cases (or *Suders*) that needs to be addressed by this Court.

B. Burlington Northern.

Jordan also looks for support in this Court's recent opinion in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___, 126 S. Ct. 2405 (2006), decided after the first panel opinion in this case, and before the panel granted rehearing, arguing that *Burlington Northern* requires a broad reading of the statute, and compels the conclusion that Jordan's opposition was entitled to protection. *See* Pet. at 15. But *Burlington Northern* deals with a different issue. To establish a cause of action for retaliation, Title VII requires that a plaintiff allege that (1) he engaged in

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discussing the color of her underwear at staff meeting and two co-workers calling her names and teasing her); *Greene v. A. Duie Pyle, Inc.*, 2006 WL 694377 (4th Cir. Mar. 20, 2006) (*per curiam*) (unreported) (employee's belief that sexually explicit materials at worksite created hostile work environment was unreasonable as a matter of law); *Curd v. Hank's Disc. Fine Furniture, Inc.*, 272 F.3d 1039 (8th Cir. 2001) (employee could not have held reasonable belief that co-worker's routinely opening his pants in front of her to tuck in his shirt created unlawful hostile work environment); *George v. Leavitt*, 407 F.3d 405, 416 (D.C. Cir. 2005) (employee, who was from Trinidad and Tobago, could not have held reasonable belief that her complaint about three incidents involving co-workers telling her to "go back to where [she] came from" created abusive work environment). The petition cites one case that raises the alleged conflict, a district court opinion from Pennsylvania, but that case was decided after the publication of Judge King's dissent in this case, and relies on it. *See* Pet. at 15-16 n.10. And, in any event, the holding in that case was that the employee's belief that a hostile work environment was created by a co-worker's racist comment was, in fact, reasonable, *see Greene v. MPW Industrial Services, Inc.*, 2006 U.S. Dist. LEXIS 72421, *13-14 (D. Pa. Oct. 4, 2006), an issue not raised in Jordan's petition.

statutorily protected activity, (2) an adverse employment action occurred, and (3) the two were causally related. *Moore v. Philadelphia*, 461 F.3d 331, 340-41 (3d Cir. 2006). *Burlington Northern* addresses only the second element--whether the employer's action (reassignment and suspension of the employee without pay) constituted a retaliatory act--*i.e.*, whether the employer "discriminated against" the employee, in section 704(a) parlance. This case, on the other hand, deals with the first element--whether Jordan engaged in protected activity, which, as discussed *supra* in part I, implicates the "made . . . unlawful" language in section 704(a). Thus, whatever impact *Burlington Northern* may have had on the "discriminated against" language in section 704(a)--the second prong of a retaliation claim--it does not even mention the first prong, and does not support the reading of the statute proposed by Jordan.

The real relevance of *Burlington Northern* to this case, as Judge Niemeyer observed, is that it confirms the applicability of an objective standard in retaliation law jurisprudence. *See* Pet. App. at 13a. In *Burlington Northern*, this Court held that an employment action would be sufficiently adverse to satisfy the second prong of a retaliation claim when "a *reasonable employee* would have found the challenged action materially adverse." *Burlington Northern*, 126 S. Ct. at 2415 (emphasis added). The Court explained that it used the "reasonable" standard "because we believe that the provision's standard for judging harm must be objective" and because "[w]e have emphasized the need for objective standards in other Title VII contexts [citing *Suders* and *Harris*], and those same concerns animate our decision here." *Id.* Far from overruling *Breeden* with respect to reasonable belief, as Jordan suggests, *see* Pet. at 17, *Burlington Northern* emphasizes the applicability of an objective standard in all of Title VII. Thus, whether a hostile work environment in fact exists requires both a subjective

(from the employee's perspective) and an objective analysis of the workplace, *see Harris*, 510 U.S. at 22; and whether conditions are so intolerable as to create a constructive discharge calls for an objective review of the facts, *see Suders*, 542 U.S. at 141. The same reasonableness standard was expressly applied in *Breeden*. *Burlington Northern* provides no basis to question the reasonableness standard relied on by the court below, and no basis on which to argue that this Court's review is required.

III. JORDAN'S SECTION 1981 CLAIM WAS PROPERLY DISMISSED BECAUSE IT FAILED TO MEET THIS COURT'S PLEADING REQUIREMENTS.

The second question posed by Jordan's petition is whether a complaint that baldly alleges a discriminatory motive for an employment action must also allege facts to support that motive. *See* Pet. at (i). In arguing for review of that question, Jordan asserts that the Fourth Circuit improperly applied a "heightened" pleading standard to his claim of racial discrimination, in conflict with this Court's decision in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), and the notice pleading requirements of Rule 8(a). Pet. at 20. But, in doing so, Jordan simply mischaracterizes the decision below.

The Fourth Circuit did *not* hold that "a complaint resting on a straightforward assertion of an unlawful motive is insufficient as a matter of law," as asserted by Jordan. *See* Pet. at 19. Rather, the circuit court held that the complaint, taken as a whole, did not assert a claim because the specific facts alleged did not support, and in fact tended to refute, the general race-based allegation. *See* Pet. App. at 22a. Thus, the question posed by Jordan is not fairly presented by the opinion below, and certiorari is inappropriate for that reason

alone. *See, e.g.*, *Rogers v. United States*, 522 U.S. 252, 253 (1998) (dismissal of writ is appropriate where question is not fairly presented by the record).

Jordan's complaint contains a conclusory allegation of motive in one paragraph ("he was fired because he is African-American" and his "race was a motivating factor" in his termination), but he did not rest on that allegation. Rather he pointed to the 24 paragraphs of facts in his complaint that, he assured the court, would support his conclusion. *See* Pet. App. at 17a, 19a. In those paragraphs, Jordan recited a story of retaliation in which neither his race, nor the race of others in the workplace, are alleged to have been pertinent to his termination. Indeed, the complaint does not identify the races of Farjah or the supervisors involved in Jordan's termination. *Cf. Swierkiewicz*, 534 U.S. at 511 (complaint alleging age and national origin discrimination identified both age and nationality of most relevant persons).

Thus, Jordan's bald allegation of race-based motive is at odds with the substance of his complaint, in which he alleges, as the district judge observed, that he was "fired for reporting a racist remark, but [alleges] no facts suggesting that his own race played a role in his termination." *See* Pet. App. (Dist. Ct. Opin.) at 70a. On appeal, Jordan did not argue that his bald allegation was sufficient but, rather, that inferences of racial bias could be drawn from his 24-paragraph factual recitation to the effect that Jordan's managers "tolerated racist comments." *See* Pet. App. at 19a. But, as Judge Niemeyer correctly concluded:

> [T]hese new allegations are not fair inferences inasmuch as they are mere speculation and argument. It does not follow that a manager who does not fire an alleged racist is therefore himself a racist, and it does not follow that a racist who fires an employee

> did so because of his racism. There is also no basis in the complaint to conclude that Jordan, as a complaining black employee, was treated differently from a white complaining employee. Indeed, there is no suggestion that any employee other than Jordan complained to management about a racist comment.

Pet. App. at 23a. The problem with Jordan's section 1981 claim, then, is not that it says too little but, rather, that it says too much. By pointing to the alleged retaliation facts to support his race-based claim, Jordan demonstrated that he has no relevant facts, and even posited a different motive for his termination--one in which his race is not alleged to be a factor. And when invited by the district judge to amend to allege facts to support his race-based claim, he declined to do so. *See* Pet. App. at 23a.

The Fourth Circuit's consideration of the entire complaint, not just the pejorative allegation of discrimination, is not inconsistent with *Swierkiewicz*. In reviewing the sufficiency of the complaint in *Swierkiewicz*, this Court identified the facts that tended to support the plaintiff's conclusory allegation of national origin and age discrimination, noting that the complaint recited in "detail[] the events leading to his termination, provid[ing] relevant dates, and includ[ing] the ages and nationalities of at least some of the relevant persons involved in his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." *Id.* at 514 (internal citation omitted). In *Swierkiewicz*, then, this Court reviewed the entire complaint to test its sufficiency; the Fourth Circuit did the same thing here in considering Jordan's complaint.

Indeed, other circuit courts, applying *Swierkiewicz* and the pleading rules, have found, as did the Fourth Circuit,

that a complaint must be "view[ed] . . . as a whole, rather than any one statement in isolation." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285 (5th Cir. 2004). *See also Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1253 n.11 (11th Cir. 2005) ("The placement of the paragraph in another count is unimportant to our review of a district court's order dismissing a complaint under Rule 12(b) of the Federal Rules of Civil Procedure. We read the complaint as a whole."). The Fourth Circuit properly considered all of Jordan's factual allegations in dismissing his section 1981 claim.

The panel majority correctly applied the *Swierkiewicz* standard, and review by this Court of this fact-bound issue is not necessary.

CONCLUSION

Jordan's petition raises no conflicts among the Circuits, or with decisions of this Court, and presents no important question of federal law requiring this Court's intervention. The petition should be denied.

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No. 06-1086

IN THE

Supreme Court of the United States

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v.

ALTERNATIVE RESOURCES CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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I. THE DECISION OF THE FOURTH CIRCUIT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT IN *BURLINGTON INDUSTRIES, INC. V. ELLERTH* AND *FARAGHER V. CITY OF BOCA RATON*

The nature of the interpretation of section 704(a) adopted by the Fourth Circuit is not in dispute. Under the decision below, an employee who is subjected to an act of racial or sexual harassment can lawfully be fired simply for reporting the harassing conduct to the employer. The anti-retaliation provision in section 704(a), the Fourth Circuit held, just does not apply until there have been so many acts of harassment that they have created (or almost created) an actionable hostile work environment. In the case of sexual harassment,

the victim is not protected from retaliation when she tells the harasser himself that his initial sexual advances or groping are unwelcome, or merely asks him to stop.

Permitting such acts of retaliation, respondents contend, is entirely consistent with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Neither *Ellerth* nor *Faragher*, respondents insist, require or even encourage harassment victims to complain (or object) when racial or sexual harassment first begins.

No member of the Fourth Circuit agreed with respondent's reading of *Ellerth* and *Faragher*, and seven disagreed. Even the panel majority embraced decisions holding that *Ellerth* and *Faragher* require that an employee "loses his right to a judicial remedy" (Pet. App. 15) if he fails to report harassment at the earliest opportunity. (*See* Pet. App. 13, *citing Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261 (4th Cir. 2001), and *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001).) Judge King, dissenting from the panel decision, noted that a worker who postponed complaining until the harassment had become actionable would have "no legal recourse" to redress that harassment in light of *Ellerth*. (Pet. App. 38a). And five members of the Fourth Circuit (including Judge King), dissenting from the denial of rehearing *en banc*, observed that under *Ellerth* workers who wait to complain until they are within the protections of section 704(a), as narrowly construed by the panel, would lose their "hostile environment claims." (Pet. App. 57a).

We showed in the petition that the prevailing interpretation among the courts of appeals, as in the Fourth Circuit, is that under *Ellerth* harassment victims forfeit their hostile environment claims by failing to invoke the employer's anti-harassment policies as soon as the harassment begins. (Pet. 10-11). Respondents do not in any way dispute (or, indeed,

refer to) our characterization of the prevailing law on this issue in the lower courts. Nor do respondents identify a single case in the nine years since *Ellerth* and *Faragher* which has ever adopted the view, now advanced by respondents, that those decisions neither require nor even encourage complaints about harassment when that abuse first begins.

The dissenting opinions below cogently explained the hopeless dilemma faced by an employee who under *Ellerth* loses his or her hostile environment claims by not complaining when the harassment begins, but who under the panel decision forfeits the protections of section 704(a) by complaining that soon. Respondents reply that this interpretation of Title VII exists in other circuits. (Br. Opp. 5). That persuasively demonstrates, not that the framers of Title VII intended to create this quandary, but only that the problem is regrettably widespread.

Ellerth expressly stated the Court's desire to "encourage employees to report harassing conduct *before it becomes severe or pervasive*." 524 U.S. at 764 (emphasis added). Respondents assert that this seemingly unambiguous holding must be "read in conjunction with" the decision three years later in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*per curiam*). (Br. Opp. 17). According to respondents, *Breeden "squarely held* that, where a reasonable person could not believe that the opposed activity was in violation of Title VII, there could be no claim for retaliation under section 704(a)." (Br. Opp. 11)(emphasis added). If *Ellerth* meant what it said, respondents argue, the Court in *Breeden* "presumably would have . . . reached a different result." (Br. Opp. 18). *Breeden*'s supposed adoption of a reasonable belief standard shows, according to respondents, that *Ellerth* never meant to require or encourage workers to complain about the onset of racial or sexual harassment. (Br. Opp. 18).

This argument is defective in both its premise and its logic. First, the Court in *Breeden* had "no occasion to rule on the propriety" of the Ninth Circuit's reasonable belief rule in retaliation cases, let alone its contours. *See* 532 U.S. at 269. Second, nothing in *Breeden* altered the holding—or undermined the rationale—of the earlier decisions in *Ellerth* and *Faragher*. *Ellerth* and *Faragher* correctly ruled that a central purpose of Title VII is to *prevent* unlawful sexual and racial harassment from occurring at all, a purpose which depends on the willingness of harassment victims to complain to their employers when the harassment begins. This objective is frustrated when prompt reporting of harassment becomes a firing offense.

Like the Fourth Circuit, respondents confuse two distinct concepts—unlawfulness and actionability. Not all unlawful practices are immediately actionable. For example, the EEOC noted below that an employee who objects to a supervisor's plan to hire only men in the future—an unlawful employment practice—is protected from retaliation, even if the plan has not been implemented and no actionable violation yet exists. Similarly, the Court has held that a hostile work environment based on sexual or racial harassment is an "unlawful employment practice" under Title VII, *e.g.*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), but the Court has also explained that a hostile environment arises over time, with the aggregation of individual actions that are not separately actionable in court. *National RR. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

All hostile work environments have a starting point, and there is always a first act which, if never repeated, might well be viewed in isolation as insufficient to create a hostile environment. It is only in hindsight that one can know whether that first act was a harbinger or an aberration. In *Ellerth* and *Faragher*, however, the Court encouraged employees not to

wait until they have an actionable claim before reporting discriminatory conduct.

Respondents' theory means that there is a window of opportunity—between the commencement of harassment and the point at which the harassment becomes actionable—during which an employer can get rid of the problem by firing any employee who reports the misconduct. Petitioner has observed before that it is unlikely that the Court used a *per curiam* opinion in *Breeden* to work so significant a departure from *Ellerth* and *Faragher*. (Pet. at 18-19). Still, some courts (including the Fourth Circuit below and the District of Columbia Circuit in *George v. Leavitt*, 407 F.3d 405, 417 (D.C. Cir. 2005)) have read *Breeden* as creating this opportunity—if not incentive—for retaliation. The Court should clarify that section 704(a) protects employees who report discriminatory conduct, even if it is not immediately actionable, because those workers are acting to prevent an unlawful employment practice from arising.

In this regard, respondents assert that the text of section 704(a) does not protect employees unless their employer has actually committed a violation of Title VII, or come so close that a worker could reasonably believe that a violation had occurred. The statutory text, however, does not mandate such a narrow interpretation. The statute forbids retaliation against an employee because he or she "has opposed any practice made an unlawful employment practice by this title." 42 U.S.C. § 2000e-3(a). In this case, petitioner Jordan promptly reported racial harassment that even respondents acknowledge was "jarring." (Br. Opp. 13). In particular, he called his employers' attention to information which they needed—and which their own anti-harassment policies solicited—in order to "prevent and correct promptly any . . . harassing behavior," *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Quite simply, Jordan "opposed" a hostile work environment by giving his employers information to "prevent and correct" it.

The Equal Employment Opportunity Commission, which supported petitioner throughout the appellate process below, thought his report of crude racism fit comfortably within the statutory text:

> § 704(a)'s protection applies not only to individuals who oppose Title VII violations that have actually occurred, but also to individuals who attempt to prevent a violation from occurring. This interpretation conforms to the ordinary meaning of the word "oppose," the crucial term in the relevant statutory text. * * * [For example,] a person who acts to prevent abortions from occurring is commonly said to be "opposing" abortion.

Amicus Brief of EEOC in Support of Request for Rehearing *En Banc* at 6-7, *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (Sept. 25, 2006).[1]

Respondents insist that there is nothing in the least amiss in both encouraging (or even requiring) employees (under *Ellerth*) to complain as soon as harassment begins, and also permitting employers (under the panel's interpretation of section 704(a)) to systematically fire all workers who do so. These two interpretations of Title VII, respondents assert, have co-existed "harmoniously" in the lower courts. (Br. Opp. 19). But the failure of the lower courts to recognize the quandary they have created for workers does not make the problem any less real. As both the EEOC and five members of the Fourth Circuit have explained, the combined effect of these two lines of cases poses a serious obstacle to the

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[1] Of course, an employee who reports harassment before it is actionable is not entitled to relief, assuming there is no retaliation. The action of the employee in reporting that harassment, however, precludes an employer from asserting the affirmative defense recognized by *Ellerth* and *Faragher*. And an employer who receives such a report is not legally obligated to take any action, although a wise employer would make some effort to investigate and prevent objectionable conduct, as *Ellerth* and *Faragher* encourage.

enforcement of Title VII. Certiorari should be granted to resolve this problem.

II. THE DECISION OF THE FOURTH CIRCUIT IS INCONSISTENT WITH THIS COURT'S DECISION IN *SWIERKIEWICZ V. SOREMA N.A.*

The amended complaint in this case alleged that respondents fired Jordan "because he is African-American" and that his "race was a motivating factor" in his discharge. (Pet. App. 43a). Respondents contend that the complaint fails to state a claim on which relief can be granted, and thus was properly dismissed under Federal Civil Rule 12(b)(6). The reasons proffered by respondents are a compelling demonstration of the inconsistency between the Fourth Circuit's interpretation of Rule 12(b)(6) and this Court's decision in *Swierkiewicz v. Sorema NA*, 534 U.S. 506 (2002).

Respondents, enthusiastically quoting the Fourth Circuit, insist the complaint is defective because a finding of racial motivation would not be a "fair inference[]" from the facts set out in the complaint. (Br. Opp. 22, *quoting* Pet. App. 23a). To be legally sufficient, respondents and the Fourth Circuit say, the facts set out in the complaint must be sufficient that a finding of discrimination would be "fair[ly] infer[red]" from those alleged facts without "mere speculation and argument." (Br. Opp. 22, *quoting* Pet. App. 23a). Respondents argue that the Fourth Circuit acted properly in evaluating all the factual allegations in complaint "as a whole," and in deciding whether those facts—if proven—would support an inference of racial discrimination. (Br. Opp. 21-24).

The requirement that a complaint include such specific probative factual allegations is precisely the approach unanimously rejected by this Court in *Swierkiewicz* and in *Leatherman v. Tarrant County Narcotics Intelligence and Coordi-*

nation Unit, 507 U.S. 163 (1993).[2] Nevertheless, respondents argue that the absence of such allegations "demonstrated that [Jordan] had no relevant facts." (Br. Opp. 23). If a defendant could demonstrate that a plaintiff had "no relevant facts" to support his or her claim, the claim could properly be dismissed—but not on the pleadings. Rather, the procedure for seeking such a dismissal is a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, under which the defendant must demonstrate through discovery and other evidentiary material that the plaintiff lacks the evidence necessary to sustain the claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The essential teaching of *Swierkiewicz* and *Leatherman* is that Rule 12(b)(6) does not require that a complaint contain the same material that would be sufficient to survive a motion for summary judgment.

Respondents suggest that the Fourth Circuit's requirement that the complaint contain facts that would fairly support an inference of discrimination applies only to complaints that actually contain facts; a complaint with only a "bald allegation" of discrimination might survive. (Br. Opp. 22). But once a plaintiff starts to assert facts, the Fourth Circuit holds, he or she must then proceed to specify facts which would justify the trier of fact in inferring the existence of a discriminatory motive. As a practical matter, however, *all* complaints contain at least some factual allegations, and thus fall under the Fourth Circuit's rule. *Swierkiewicz* itself requires that a plaintiff give "fair notice of what [his or her] claims are and the grounds upon which they rest." 534 U.S. at 514.

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[2] *See Swierkiewicz*, 534 U.S. at 509 (district court dismissed complaint because it did not contain "circumstances that support an inference of discrimination"; court of appeals affirmed dismissal because the allegations in the complaint did not "raise an inference of discrimination").

Respondents object that the complaint here is insufficient because it fails to allege the race of the supervisors involved in Jordan's termination, suggesting that *Swierkiewicz* requires such allegations. (Br. Opp. 22, *citing Swierkiewicz*, 534 U.S. at 511). *Swierkiewicz* assuredly does not contain any such pleading requirement. This Court has made clear that a plaintiff can establish a claim of discrimination even though the alleged discriminatory official was the same race, gender or age as the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 139, 152-53 (2000)(age); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-79 (1998)(race, gender).

Finally, respondents assert that the complaint did not state a claim for racial discrimination because the allegations, if true, demonstrated that Jordan had been fired for "a different motive," retaliation. (Br. Opp. 23). This argument ignores Federal Civil Rule 8(a), which expressly permits pleading in the alternative. In addition, the existence of a retaliatory motive would not prove that racial discrimination had not also occurred. Title VII is not premised on the view that a given employment action, such as a dismissal, could only be the result of a single impermissible motive. To the contrary, section 703(m), 42 U.S.C. § 2000e-2(m), provides that a plaintiff can prevail if race "was a motivating factor for any employment practice, even though other factors also motivated the practice."

Twice since *Swerkiewicz*, the Court has again rejected judicially crafted pleading requirements that exceed what is called for under the Federal Rules. *Hill v. McDonough*, 547 U.S. ___, 126 S. Ct. 2096 (2006); *Jones v. Bock*, ___ U.S. ___, 127 S. Ct. 910 (2007). Yet that is precisely the Fourth Circuit's error here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

No. 06-1086

ROBERT L. JORDAN,

Petitioner,

v.

ALTERNATIVE RESOURCES CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, EQUAL RIGHTS ADVOCATES, AND THE NATIONAL DISABILITY RIGHTS NETWORK, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

Amici here, organizationally and through their members, represent individuals under federal statutes prohibiting dis-

[1] The parties have consented to the filing of this brief, and their written consent is on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

crimination, including Title VII of the Civil Rights Act of 1964; 42 U.S.C. §§ 1981, 1983; the Age Discrimination in Employment Act; and the Americans with Disabilities Act. *Amici* or their members counsel employees who have experienced workplace conduct that might be considered, or may ripen into, a hostile environment.[2]

Amici maintain an acute interest in this case because the decision below creates conflicting law as to the proper advice that attorneys should offer to clients or prospective clients who encounter instances of obvious bias on the part of others in the workplace. While a lawyer is required to render "candid advice" when asked for a professional opinion, MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1, the lines between what conduct is immediately actionable, almost actionable, and what might be rejected as "isolated" at some point in the future are not clear. For example, an employee seeking advice as to when she should complain because her supervisor openly used the word "nigger" should be advised that it is important to notify her employer in order to prevent further harassment and to protect her legal rights under this Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). If practicing in the Fourth Circuit, however, the attorney cannot make an easy call as to what advice is appropriate. As the Model Rules advise us, "advice couched in narrow legal terms may be of little value to a client, especially where practical considerations . . . are predominant." MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1, cmt. [2]. Thus, a lawyer in the Fourth Circuit may be compelled to advise the client that, while an early report of extremely offensive racist or sexist conduct may help the employer prevent a severe or pervasive hostile work environment, the employer may then

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[2] The NAACP has long supported fair employment practices, including vigorous enforcement of Title VII of the Civil Rights Act, and a construction of the Act that is consistent with the intent of its framers.

lawfully terminate the reporter. This conflict exemplifies the imbalance created by the decision below to the carefully crafted remedial scheme, which is calculated to prevent discrimination.[3] Fuller statements of interest for all *amici* are included in the appendix to this brief.

STATEMENT

This case concerns the application of Section 704(a) of Title VII, which makes it unlawful for an employer to discriminate against an employee who "has opposed any practice made an unlawful employment practice" by the Act. 42 U.S.C. § 2000e-3(a). Petitioner Robert L. Jordan, an African American, complained to his employer that a co-worker stated openly that "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them." (Court of Appeals Joint Appendix, p. 81.) Jordan also complained that, according to two other employees, the same individual had a history of making similarly offensive remarks. (*Id.*) Jordan was fired the following month.

Assuming that Jordan was fired because of his complaint, the district court granted the employers' motion to dismiss pursuant to Rule 12(b)(6), holding that Jordan had not engaged in "statutorily protected activity." (Petitioner's Appendix at 64a-66a.) After hearing and rehearing the case, a divided panel of the Fourth Circuit affirmed. The panel acknowledged the remark at issue was "unacceptably crude and racist," but that such "unacceptable racism" and indications that racist comments had been made in the past could not reasonably lead Jordan to the conclusion that the conduct was "likely to recur at a level sufficient to create a hostile work

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[3] Under the Americans with Disabilities Act, courts often adopt the Title VII analysis for harassment, *e.g.*, *Lanman v. Johnson County, Kansas*, 393 F.3d 1151, 1155 (10th Cir. 2004) (citing cases), and for retaliation, *e.g.*, *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1336 (11th Cir. 1999).

environment." (*Id.* at 9a-10a, 12a.) The court reasoned that obvious racism was "insufficient conduct about which to complain," because Title VII jurisprudence typically recognizes a hostile environment only after a series of unlawful acts. (*Id.* at 14a-15a.)

SUMMARY OF ARGUMENT

All lower courts agree that the opposition clause of Section 704(a) of Title VII protects employees who maintain a good faith reasonable belief that they are reporting a violation of law. Within that standard, however, courts have taken diverging paths. While this Court explicitly declined to announce a standard in *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001) (*per curiam*), the sharply-divided decision below has highlighted the critical need for uniformity, particularly given the clear incentives established by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

The current uncertain state of law ill-serves the objectives of Title VII because it discourages individuals from bringing hostile workplace conduct to their employer's attention for fear of reprisal. Whatever the precise contours of the objectively reasonable standard, there should be little doubt that Mr. Jordan's complaints about the unambiguously racist conduct at issue here, with potent connotations of enslavement, rape, and beastliness, should be protected.

ARGUMENT

I. PETITIONER ENGAGED IN PROTECTED ACTIVITY

A. The Content of the Remarks Reasonably Led Petitioner to Believe He Was Subjected to Unlawful Conduct.

The remarks at issue and the fact that the speaker had a history of making "similar offensive comments" reasonably

led Petitioner to conclude that his co-worker's conduct was unlawful. The statement, "They should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them," denigrated Petitioner's race and expressed a desire to carry out violence against people of his skin color. The symbols expressed in the remarks call forth a history of violent oppression against African Americans during centuries of being treated as chattel and subsequent history of Jim Crow laws.

Comparing the use of animalistic references to the term "nigger," the Fourth Circuit recognizes that "use of the word 'monkey' to describe African Americans" is "similarly odious." *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 298 (4th Cir. 2004). "To suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001). *Cf. Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting) ("In every culture, certain things acquire meaning well beyond what outsiders can comprehend").

Linking African Americans to primates conveys more than mere trivial disrespect; rather, calling people "black monkeys" endorses the historical view that African Americans are inferior to Caucasians. (*See* Eric Foner, *Forever Free, The Story of Emancipation & Reconstruction* 192-93 (2006).) Indeed, the term "monkeys" relegates African Americans to the status of non-persons or "subhumans," a view that undergirded racial oppression and facilitated systematic exclusion from basic rights of citizenship. (*See* N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321 (2004) (Duru) (citing Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro 1550-1812*, 28-29

(1968)); *see also* Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* 245-46 (1998).)

Dehumanizing blacks as extraordinarily sexual was also used to justify post-slavery lynchings. (*See* Duru, *supra* at 1327.) Invoking the widely held fear that black men had an unrestrained desire to rape white women, one prominent Georgian journalist announced: "if it takes lynching to protect woman's dearest possession from drunken, ravening beasts, then I say lynch a thousand a week." (*See* Duru, *supra* at 1327 (quoting Grace Elizabeth Hale, *Making Whiteness: The Culture of Segregation in the South, 1890-1940* 234 (1998)).)

B. The Lower Courts' Divergent Approaches to Protected Activity should be Harmonized.

"The dominant purpose" of Title VII "is to root out discrimination in employment." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). Congress sought the elimination of discrimination not only through force of private litigation but also through encouragement of voluntary compliance and remediation "without resort to the courts." *Id.* at 77-78. Consequently, the lower courts agree that Section 704(a) of Title VII protects against retaliation in the absence of an actual underlying violation.

> Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim. . . . [A] retaliation claim may succeed where no sex discrimination ever took place.

Jackson v. Birmingham Bd. of Educ. 544 U.S. 167, 187 (2005) (Thomas, J. dissenting) (citing cases).

In considering the reach of Section 704(a), this Court in *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (*per curiam*) declined to establish a specific standard for when the subject of an employee's complaint provides

protection from subsequent retaliation. Although all require a complainant to have "a reasonable good faith belief" of discrimination, the courts have nonetheless developed widely divergent approaches to the issue.

In the Seventh Circuit, for instance, a "reasonable good faith belief" means that an employer "may not retaliate against anyone for claiming a violation of Title VII unless that claim is 'completely groundless.'" *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002). Although the plaintiff in *Fine* lost her discrimination claim, the Court explained that the inquiry does not end with the entry of judgment on the underlying claim:

> Many claims might appear legitimate on the surface, but after discovery and a harder look at the full picture they turn out ultimately to lack merit. Under Title VII, a person may not be terminated for making such a grounded, yet unsuccessful, complaint.

Id. Other courts take a similar approach. *See, e.g., Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1118 n. 1 (8th Cir. 2006) (complaint clearly not frivolous).

In such cases, courts first look to common-sense experience to gauge the reasonableness of the employees' belief that he or she had been subjected to discrimination. In *Fine*, the plaintiff and her female co-workers had mistakenly perceived disparate treatment based on first hand observation, and in *Wallace*, the plaintiff complained of a few instances of lewd and sexually explicit conduct that fell short of a hostile environment. *Fine*, 305 F.3d at 752; *Wallace*, 442 F.3d at 1118.

Such standards have proven workable to weed out baseless discrimination allegations lacking in good faith. *See Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 889-91 (7th Cir. 2004) (retaliation claim properly dismissed because claim of hostile work environment was "utterly groundless" and did not meet

the reasonable, good faith test, consistent with *Clark County School Dist.*) In sum, these courts recognize the critical distinction between complaints of retaliation and discrimination for determining a violation of Section 704(a):

> "A claim for retaliation is not based upon [prohibited] discrimination, but instead upon an employer's actions taken to punish an employee who makes a claim of discrimination." [*Haas v. Kelley Servs., Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005)]. In general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim.

Wallace, 442 F.3d at 1118.

In contrast, the Fourth Circuit below analyzed the reasonableness of the employee's belief not upon the everyday experience of an employee subjected to vile racist remarks (with knowledge such remarks had been repeated "many times" before), but instead through the lens of a court assessing the propriety of an underlying hostile environment claim. The Court reviewed hostile environment case law to conclude that such claims typically comprise a series of acts. Thus, it concluded, Petitioner's complaint failed to fall within the definition of workplace harassment. (Pet. App. at 8a-9a; *id.* at 10a ("The complaint does not describe a workplace permeated by racism, by threats of violence, by improper interference with work, or by conduct resulting in psychological harm." (citing *Faragher*; 524 U.S. at 787-88).) While the court acknowledged that "the distinction between a racial slur and a hostile workplace may at a highly abstract level seem a difficult one for employees to manage," it nonetheless confined its inquiry to legal interpretations of the Act, rather than everyday experience, to determine whether Petitioner's complaint was reasonable. (Pet. App. at 14a ("Jordan overlooks the fact, which is fundamental to Title VII jurisprudence, that

there is a difference between an isolated racial slur . . . and the sort of severe or pervasive conduct that creates a hostile work environment."))

In effect, the court bypassed an inquiry grounded in everyday experience of laypeople: *i.e.*, the objectively reasonable standard at issue in Section 704(a). Particularly where, as here, employees are encouraged by workplace policies to report hostile conduct, an employee may reasonably perceive a duty to report obviously racist or sexist conduct that may not, in fact, amount to a cognizable hostile environment claim. One example of such a policy is that promulgated by the Alabama State Bar, which defines "harassment" to include "slurs, jokes, and other verbal, graphic or physical conduct relating to an individual's race." ALA. STATE BAR *Harassment Policy* at II, (published at www.abanet.org/barserv/library/k/personnel_policies/4679.pdf). While the State Bar does not limit its definition of "harassment" to only instances that are sufficiently severe or pervasive to alter the terms and conditions of employment, it still requires employees to report all "such conduct." *Id.* Such a policy is hardly unique.

Because of these differences, *amici* urge this Court to take up the question left open in *Clark County School Dist. v. Breeden*, and to create a uniform standard for protecting discrimination complainants from retaliation. The answer will provide clarity and uniformity in the law and should help preserve the primary objectives of the anti-discrimination statutes to root out and prevent discrimination in employment.

II. THE FOURTH CIRCUIT'S RULING DISCOURAGES INFORMAL RESOLUTION OF DISCRIMINATION COMPLAINTS

As attorneys on behalf of employees, *amici* or their members counsel individuals confronting discriminatory workplace conduct. Since this Court's decisions in *Faragher v.*

City of Boca Raton, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) in particular, *amici* regularly advise employees to promptly bring to the employers' attention racist or sexist conduct[4] in order to discourage further harassment and to preserve the employees' legal rights should the hostile behavior continue. The incentives for employers to create effective remedial mechanisms and for employees to promptly invoke those procedures are clear.

The Fourth Circuit changed the equation. In his brief, the Petitioner illustrated the manner in which the panel majority's opinion forces an employee facing hostile conduct to potentially sacrifice rights under either Section 703(a) or Section 704(a). After *Jordan*, attorneys may discourage an employee from attempting early informal resolution and to instead allow the conduct to escalate, though that would risk compromising the employee's legal rights under the *Faragher* and *Ellerth* affirmative defense. Alternatively, an attorney could direct an employee to complain immediately to the EEOC, thereby invoking the participation clause of Section 704(a).[5] Although such a course may better preserve the employee's legal rights for any eventual hostile environment or retaliation cause of action, it does so at the cost of escalating the complaint beyond the favored path of voluntary compliance and informal resolution, *see, e.g., Burlington Indus., Inc.*, 524

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[4] Unfortunately, overtly discriminatory expressions based on disability —including pervasive use of such terms as "cripple" or "retard" —have also permeated some workplaces. *See, e.g., Luttrell v. Certified Grocers Midwest, Inc.*, 2003 WL 22844239, at *3 (N.D. Ill. Dec. 1, 2003); *EEOC v. Luby's Inc.*, 2005 WL 3560616, at *5 (D. Ariz. Dec. 29, 2005); *Farrington v. Bath Iron Works Corp.*, 2003 WL 278172 (D. Me. Feb. 7, 2003).

[5] Unlike the opposition clause, many courts interpret the plain language of the participation clause to contain no reasonableness component and to provide greater legal protection from retaliation. *See, e.g., Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999), *cert. dismissed*, 528 U.S. 1146 (2000).

U.S. at 764, and arguably risks heightening retaliatory animus and workplace disruption.

CONCLUSION

The *per curiam* decision of this Court in *Clark County School Dist. v. Breeden* left open a critical question regarding the standards applied to employees such as Petitioner here who are faced with virulent expressions of racism in the workplace. The decision of the Fourth Circuit in this case cannot be harmonized with the breadth of Section 704(a) of Title VII or with the remedial imperative of the Act.

Amici request that this Court grant *certiorari* and reverse the decision of the court of appeals.

Respectfully Submitted,

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APPENDIX

APPENDIX

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. The NAACP has long supported fair employment practices, including the vigorous enforcement of Title VII of the Civil Rights Act, and a construction of the Act that is consistent with the intent of its framers.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974), *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and is co-counsel in the current sex discrimination case of *Dukes v. Wal-Mart Stores*, in the United States District Court, Northern District of California. ERA has

appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). The issues raised in this case are of critical importance to women workers who are all too often subjected to highly offensive and degrading treatment on the basis of sex which creates a hostile work environment.

The National Disability Rights Network (NDRN) is the membership association of protection and advocacy (P&A) agencies that are located in all 50 states, the District of Columbia, the Native American community, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.